65

Supreme Court, U.S.
FILED
07-284 AUG 31 2007
OFFICE OF THE CLERK

(1)

No. ____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

JOHN AUGUST PAULINO,
Respondent.

On Petition for Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

DOUGLAS F. GANSLER
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
EDWARD J. KELLEY
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

QUESTION PRESENTED

Where the police have reason to believe that a suspect is concealing cocaine between his buttocks cheeks, is it reasonable under the Fourth Amendment for the police, at the scene of the arrest, to reach into the suspect's undershorts and seize the cocaine as a search incident to the suspect's arrest?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. In the absence of guidance, there is conflict in the lower courts regarding the reasonableness of a strip search, or other search underneath a suspect's clothing, incident to arrest 10

A. The Maryland Court of Appeals' decision deepens an existing conflict over what constitutes a "strip search." ... 13

B. The Maryland Court of Appeals' decision deepens an existing conflict over whether searches underneath a suspect's clothes may be conducted at the scene of the arrest. 17

Page

II. The Maryland Court of Appeals' decision is erroneous 20

III. This is an important and recurring issue 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Amaechi v. West, 237 F.3d 356 (4th Cir. 2001) 16

Bell v. Wolfish, 441 U.S. 520 (1979) ..... 7, *passim*

Bobbit v. State, 394 S.E.2d 385 (Ga. App. 1990) ... 16

Chimel v. California, 395 U.S. 752 (1969) 11, 26

Commonwealth v. Prophete, 823 N.E.2d 343 (Mass. 2005) 16

Commonwealth v. Thomas, 708 N.E.2d 669 (Mass. 1999) 20

Edwards v. State, 759 N.E.2d 626 (Ind. 2001) 20

Fernandors v. District of Columbia, 382 F.Supp.2d 63 (D.D.C 2005) 16

Page

Fuller v. M.G. Jewelry, 950 F.2d 1437
(9th Cir. 1991) 12, 20

Illinois v. Lafayette, 462 U.S. 640 (1983) 11, 25

Justice v. City of Peachtree City, 961 F.2d 188
(11th Cir. 1992) 13

Marriott v. County of Montgomery,
426 F.Supp.2d 1 (N.D.N.Y. 2006) 16

Mary Beth G. v. City of Chicago, 723 F.2d 1263
(7th Cir. 1983) 13

McCloud v. Commonwealth, 544 S.E.2d 866
(Va. App. 2001) 16

McGee v. State, 105 S.W.3d 609
(Tex. Crim. App.), *cert. denied*,
540 U.S. 1004 (2003) 23

Paulino v. State, 399 Md. 341,
924 A.2d 308 (2007) 1

People v. Butler, 813 N.Y.S.2d 366
(N.Y. App. Div. 2006), *lv. dismissed*,
850 N.E.2d 675 (N.Y. 2006) 15, 16, 18

People v. Kelley, 762 N.Y.S.2d 438
(N.Y. App. Div. 2003), *lv. denied*,
808 N.E.2d 366 (N.Y. 2004) 20

People v. Mitchell, 768 N.Y.S.2d 204
(N.Y. App. Div. 2003) 18

Schmerber v. State of California,
384 U.S. 757 (1966) 22

Schmidt v. City of Lockport, 67 F.Supp.2d 938
(N.D. Ill. 1999) 16

Scott v. Harris, 127 S.Ct. 1769 (2007) 26

State v. Jenkins, 842 A.2d 1148
(Conn. App. 2004) 12, 15, 16, 18

State of Maryland v. John August Paulino,
No. 223, September Term, 2004
(filed July 12, 2006) 1

State v. Nieves, 383 Md. 573,
861 A.2d 62 (2004) 13, 20

State v. Smith, 464 S.E.2d 45 (N.C. 1995),
cert. denied, 517 U.S. 1189 (1996) 15, 18

Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997) 12

Thompson v. State, 824 N.E.2d 1265
(Ind. App. 2005), *transfer denied*,
841 N.E.2d 176 (Ind. 2005) 17

Page

United States v. Ashley, 37 F.3d 678 (D.C. Cir.1994), *cert. denied*, 513 U.S. 1181 (1995) 15, 18

United States v. Cofield, 391 F.3d 334 (1st Cir. 2004) 18, 23

United States v. Edwards, 415 U.S. 800 (1974) 12

United States v. Ford, 232 F. Supp.2d 625 (E.D. Va. 2002) 24

United States v. McKissick, 204 F.3d 1282 (10th Cir. 2000) 15, 18

United States v. Robinson, 414 U.S. 218 (1973) ..... 10, *passim*

United States v. Williams, 209 F.3d 940 (7th Cir. 2000) 15, 16, 18

United States v. Williams, 477 F.3d 974 (8th Cir. 2007) ..... 11, *passim*

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) 25

Winston v. Lee, 470 U.S. 753 (1985) 22

Wood v. Hancock County Sheriff's Department,
354 F.3d 57 (1st Cir. 2003) 16

Constitutional Provisions:

Amendment IV ..... 2, *passim*

Amendment XIV 2

Statutes:

28 U.S.C. § 1257 1

Rules:

Rules of the Supreme Court, Rule 13 1

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Paulino v. State*, 399 Md. 341, 924 A.2d 308 (2007) (filed June 4, 2007), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-48a).

The unreported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. John August Paulino*, No. 223, September Term, 2004 (filed July 12, 2006), affirming the judgment of the Circuit Court for Baltimore County, is reproduced in Appendix B. (App. 49a-58a).

The unreported opinion of the Circuit Court for Baltimore County in *State of Maryland v. John August Paulino*, No. 00CR3812 (rendered June 18, 2001), denying Paulino's suppression motion, is reproduced in Appendix C. (App. 59a-61a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on June 4, 2007. This petition is filed within 90 days of the date of that judgment, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 29, 2000, John August Paulino was arrested by the police and a quantity of cocaine was seized from his person pursuant to a warrantless search incident to his arrest. (App. 2a-6a, 29a). Paulino was charged with possession with intent to distribute cocaine and possession of cocaine. (App. 6a). Paulino filed a motion to suppress the cocaine that was seized from his person, and this

motion was heard in the Circuit Court for Baltimore County, by the Honorable Dana Mark Levitz, on June 18, 2001. (App. 6a, 59a).

At the suppression hearing, Detective Elliott Latchaw of the Baltimore County Community Drug and Violence Interdiction Team testified that, on September 29, 2000, the police were conducting a drug investigation based on information received from a reliable informant. (App. 2a, 29a). Latchaw provided specific examples of how the informant proved reliable in previous narcotics investigations, which resulted in the seizure of contraband and the detention of at least one distributor of cocaine. (Tr. 5-6).[1]

With regard to the investigation of Paulino, who was known to the police based on "past narcotics offenses," the reliable informant told the police that he or she had personal information that, on September 29, 2000, Paulino

> was going to be in the area of Merritt Boulevard and North Point Road, specifically the 1100 block of North Point Road, which would be a car wash, and Mr. Paulino would be traveling in a Jeep Cherokee and that he would be in possession of a quantity of crack cocaine and that he would also have it secreted in his buttocks area between his butt cheeks.

(App. 2a-3a; Tr. 7).

According to Latchaw, the informant's knowledge of Paulino's possession of crack cocaine and his impending presence at the car wash was obtained by the informant

---

[1] "Tr." refers to the transcript of the suppression hearing held on June 18, 2001.

through a conversation the informant had with Paulino that same day. (Tr. 8-10). The informant knew that Paulino stashed drugs between his buttocks cheeks based on the informant's prior dealings with Paulino. (Tr. 10-11). The informant did not tell the police the quantity of drugs Paulino would have in his possession. (Tr. 8, 10).

The police set up surveillance at the stated car wash on the evening of September 29. (App. 2a). When asked if this location was "fairly busy at that time of night," Latchaw stated that it was not:

> Not at all. It's actually – the car wash is actually back – you pull into a parking lot, and you've got to go past an entrance to a storage facility, like those little mini storage buildings, and actually go past a – like an auto repair center. And then at the very end of this little parking lot, it's kind of like a zigzaggy entrance. Driveway kind of turns around to the left and comes back to the right, and the very back is the car wash all by itself. It's real secluded back there, actually.

(App. 3a).

At 11:14 p.m., Paulino was observed by the police sitting in the passenger seat of a vehicle that was parked in one of the car wash bays. (App. 2a-5a; Tr. 11-14). The police "blocked in" Paulino's vehicle inside the bay. (App. 3a). The police arrested Paulino, removed him from the vehicle, and searched his person. (App. 29a). Latchaw described the search as follows:

> Well, when we – when Mr. Paulino was removed from the vehicle and laid on the ground, his pants were already pretty much down around his - - below his butt, because I guess that's the fad, these

guys like wearing their pants down real low, so it was just a matter of lifting up his shorts, and - - and between his butt cheeks, the drugs were - - I believe one of the detectives actually put on a pair of gloves and just spread his butt cheeks apart a little bit and it was right there.

[DEFENSE COUNSEL]: So they were not visible before you actually spread his cheeks apart, is that correct?

LATCHAW: I don't think they were.

. . .

[DEFENSE COUNSEL]: And that's where the drugs were found.

LATCHAW: Yes sir.

(App. 5a-6a, 30a; Tr. 12-13).

During the following colloquy, Latchaw explained that, given the time and place of the search, the search was not observable to others:

[DEFENSE COUNSEL]: Were there any other people back there at that time around eleven-fifteen that evening other than yourself and Mr. Paulino?

LATCHAW: No, not that I – not that I can remember.

[DEFENSE COUNSEL]: Yourself - -

LATCHAW: Well, other units of Baltimore County Police. Right.

[DEFENSE COUNSEL]: No civilian personnel?

LATCHAW: No. Nobody was washing their cars, that I can remember.

[DEFENSE COUNSEL]: Is that a lighted area, dark area?

LATCHAW: Well lit.

> [DEFENSE COUNSEL]: Is that viewable by people in the area walking by or not really?
>
> LATCHAW: No. No, it's way back. It's back off the road. It's real secluded.

(App. 4a; Tr. 11-12).

Paulino testified that he was arrested "[i]nside of a car wash, a local car wash." (App. 5a-6a). According to Paulino, at the time he was searched, the persons present were his three friends and "about 12 other officers." (App. 5a-6a). He described the search as follows:

> They had searched me in my pockets, didn't find nothing, and eventually, they came to the subject where - - where in my report, it states that the officer said, Mr. Paulino, why is your butt cheeks squeezed? And in further response, I said nothing. He said it again, and another officer come behind with gloves and pulled my pants down and went in my ass. Well, my cheeks. Sorry about that.

(App. 6a). Paulino stated that he did not tell anyone that he was delivering drugs that day. (Tr. 17-18).

After the close of the evidence, defense counsel argued that the law required that the police conduct a "cavity" search of this kind in a private place. (Tr. 19). According to the defense, the police "should have probably removed him to a more discrete area, knowing that his drugs were allegedly where they were found." (Tr. 19).

The court determined first that the police had probable cause to arrest Paulino and also reason to suspect that Paulino was concealing drugs between the cheeks of his buttocks. (App. 59a-60a). The court denied the motion to suppress and stated the following reasons:

> Now, I'm not convinced that this was a body

> and cavity search, quite frankly, not on the evidence I've heard presented to me, because somebody that has a bag of drugs concealed in their pants and happens to have it between their cheeks of their buttocks doesn't mean that it's in their body cavity. And quite frankly, it seems to me, from the evidence I've heard, I'm not convinced that that's so, so I'm not really concerned about the cases that talk about body cavity searches, going into someone's body cavities to determine or find the drugs.
>
> It seems to me that the police have probable cause to conduct the search they did and recover the cocaine they did. So the motion to suppress evidence is denied.

(App. 60a).

Paulino was tried by the court on an agreed statement of facts and, on July 3, 2001, the court, the Honorable James T. Smith, convicted Paulino of possession of cocaine with the intent to distribute. (App. 6a). Paulino was sentenced to a mandatory ten-year term of incarceration as a subsequent offender. (App. 6a). The Court of Special Appeals of Maryland, applying the factors outlined in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), affirmed the suppression court's ruling, finding that the search of Paulino was a reasonable intrusion incident to his lawful arrest given the information known to the police at the time of the search. (App. 49a-58a).

The Court of Appeals of Maryland, in a 4-3 decision, reversed this ruling. (App. 9a-26a). Concluding that the police "attempted to manipulate Paulino's clothing in such a manner that his buttocks could be more readily viewed,"

and that "the officers manipulated his buttocks to allow for a better view of his anal cavity," the majority held that the search of Paulino constituted both a strip search and a visual body cavity search. (App. 14a, 16a).

The majority found that the search did not survive the *Bell v. Wolfish* test. Although accepting that the search of Paulino's buttocks was justified given the information provided to the police, the majority found that the search was nevertheless unreasonable because there existed no exigency justifying a search of this manner in the parking lot of a car wash. (App. 17a-26a). The majority's holding was influenced by the fact that, in its view, the police did not take any precautions to ensure the search could not be viewed by others present at the scene. (App. 22a-24a). In declaring the search unreasonable, the majority also noted that viable alternatives to the on-scene search existed; for instance, the police could have conducted a pat-down search for weapons at the scene of the arrest and then conducted the search inside a vehicle or at the police station. (App. 25a-26a).

Three judges joined in dissent, opining that the search of Paulino did not violate the Fourth Amendment. The dissent concluded that, because none of Paulino's clothes was removed, the search was not a strip search as that term had been defined by it and other courts. (App. 29a-30a, 37a-41a). Relying on cases with analogous circumstances, the dissent found that the search of Paulino was instead a reach-in search that was justified incident to his arrest for narcotics offenses. (App. 29a-41a).

The dissent went on to say that, even if the search constituted a strip search, it survived scrutiny under the *Bell v. Wolfish* factors because the search "was no more

intrusive than necessary to determine whether Paulino possessed drugs," and the police took reasonable precautions to protect Paulino's privacy interests. (App. 42a-46a). In this regard, the dissent noted that "there [was] no evidence that anyone saw Paulino's genitalia, nor that anyone other than the searching officer saw Paulino's buttocks." (App. 45a). The dissent pointed out that the majority's *per se* rule that strip searches must be conducted in an enclosed area was inconsistent with the standard of reasonableness set forth in *Bell v. Wolfish*. (App. 42a).

REASONS FOR GRANTING THE WRIT

This case raises important issues concerning searches incident to arrest where the police have reason to believe that a suspect is concealing contraband underneath his or her clothing. Review by this Court is necessary for at least two reasons. First, this Court has not yet defined when and under what circumstances a strip search or other search of intimate areas underneath a suspect's clothing is reasonable incident to arrest. The absence of guidance on this issue has resulted in conflict among lower courts, which unavoidably frustrates street level police action. Second, to the extent that the factors set forth by this Court in *Bell v. Wolfish* apply to determine the reasonableness of a search of intimate areas underneath a suspect's clothing incident to an arrest, the state court misapplied those factors and reached a determination that wrongly outlaws entirely reasonable police conduct.

The Maryland Court of Appeals' decision applied an incorrect standard in holding that the search of Paulino

was unreasonable. Initially, the court improperly assessed the nature of the intrusion, characterizing the search of the fully-clothed Paulino as both a strip search and a body cavity search. Moreover, the court essentially created a *per se* rule that any on-scene search of the intimate areas underneath an arrestee's clothing requires exigent circumstances and must be conducted in an enclosed area. These rulings are in direct conflict with the balancing test set forth in *Bell v. Wolfish*, and with the rulings of other courts that have considered searches of similar kind under similar circumstances. The fractured opinion below reflects the conflict among lower courts regarding how to analyze the reasonableness of searches conducted incident to arrest of a suspect believed to be concealing drugs on his or her person.

With this case, the Court can address the circumstances in which a strip search or other search of the intimate areas underneath the clothing of an arrestee may or may not be appropriate. The Court can also clarify the boundaries for conducting an on-scene search incident to an arrest where the police have reason to believe the arrestee is concealing contraband on his or her person.

I. In the absence of guidance, there is conflict in the lower courts regarding the reasonableness of a strip search, or other search underneath a suspect's clothing, incident to arrest.

This Court has recognized that a person lawfully arrested may, without a warrant, be subjected to a complete search of his or her person incident to arrest. In *United States v. Robinson*, 414 U.S. 218, 235 (1973), this

Court held that, "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." The purpose of the search incident to arrest exception is to safeguard police by allowing them to secure weapons promptly and to prevent the criminal from concealing or destroying evidence of their criminal behavior. *Chimel v. California*, 395 U.S. 752, 763 (1969); *accord United States v. Robinson*, 414 U.S. at 227 (holding that full search incident to arrest can involve "a relatively extensive exploration of the person" aimed at locating weapons or evidence that could be concealed or destroyed).

This Court has not yet addressed, however, whether the authority to conduct a full search incident to an arrest includes the authority to search intimate areas underneath a suspect's clothing, whether by a strip search or a reach-in search.[2] Indeed, this Court has not defined what constitutes a strip search or given guidance regarding the circumstances under which a strip search or reach-in search incident to arrest is reasonable. In *Illinois v. Lafayette*, 462 U.S. 640 (1983), although stating that the "interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street," *id.* at 646, this Court declined to opine on the propriety of conducting a strip search incident to an arrest, stating that

---

[2] "A 'reach-in' search involves a manipulation of the arrestee's clothes such that the police are able to reach in and retrieve the contraband without exposing the arrestee's private areas." (App. 24a, *citing United States v. Williams*, 477 F.3d 974, 977 (8th Cir. 2007)).

it was "not addressing in *United States v. Edwards*, 415 U.S. 800 (1974), and do[es] not discuss here, the circumstances in which a strip search of an arrestee may or may not be appropriate." 462 U.S. at 646 n.2.

Although this Court has not addressed this issue, the Maryland Court of Appeals held that a strip search is not permitted as a full search incident to arrest pursuant to *United States v. Robinson* unless an additional showing is made. (App. 11a-13a, 21a) (because strip search involves a more invasive search than routine search incident to arrest, there must be additional proof of exigency and reasonableness). Other lower courts similarly have held that a separate analysis is required for a strip search or other search exposing areas underneath a suspect's clothing. *Williams*, 477 F.3d at 976-78 (applying separate analysis to reach-in search); *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (noting that strip and visual body cavity search requires independent analysis under Fourth Amendment); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (holding that "full search" incident to arrest authorized by *United States v. Robinson* did not contemplate strip search or bodily intrusion); *State v. Jenkins*, 842 A.2d 1148, 1157 (Conn. App. 2004) (same).

In the absence of guidance, most courts assessing the reasonableness of a search beneath a suspect's clothing, whether by strip search or reach-in search, rely on the factors set forth by this Court in *Bell v. Wolfish*. There, in analyzing the reasonableness of an institutional policy of strip searching pretrial detainees after contact visits with persons from outside the institution, the Court explained:

> The test of reasonableness is not capable of precise definition or mechanical application. In each case

> it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

441 U.S. at 559.

Bell v. Wolfish, though addressing an intimate search performed in a different context, set forth factors that are relevant in assessing the reasonableness of a search underneath a suspect's clothing incident to a lawful arrest. But substantial conflict has arisen in application of this test. Guidance by this Court is needed regarding how to assess the various factors set forth in *Bell v. Wolfish*.

A. The Maryland Court of Appeals' decision deepens an existing conflict over what constitutes a "strip search."

When evaluating the scope and manner of a search underneath a suspect's clothing, lower courts typically start by categorizing the search as either a strip search or a reach-in search. Because a strip search is viewed as demeaning, dehumanizing and terrifying, lower courts subject strip searches to heightened scrutiny, and this factor will be weighed heavily against the state in determining the propriety of the search. *See, e.g., Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983); *State v. Nieves*, 383 Md. 573, 586, 861 A.2d 62 (2004).

By contrast, a reach-in search of a clothed suspect that

does not display the private areas of a suspect's body to onlookers is less intrusive, which makes it more likely that the search will be upheld as reasonable. For example, in *Williams*, 477 F.3d at 974, the Eighth Circuit found reasonable a reach-in search wherein, on a police precinct parking lot surrounded by a residential neighborhood, an officer opened Williams's pants, reached inside his underwear, and removed a large amount of crack and powder cocaine.[3] Noting that there was no question "that the police were justified in searching inside Williams's pants because "[t]he police possessed a warrant authorizing them to search his person for drugs and firearms, and an initial pat-down produced specific probable cause that Williams was hiding something inside his pants," the court stated that the proper issue was "whether the search was reasonable in its scope, manner, and location." *Id.* at 975. The court found that the search was reasonable, noting that, although Williams was searched on a parking lot, there was no evidence that persons other than the officers involved would have seen the private areas of Williams's body. *Id.* at 977.[4]

---

[3]Williams has filed a petition for a writ of certiorari that is pending in this Court at Docket Number 07-5250.

[4] The court further rejected the notion that the search was unreasonably intrusive based on the "intimate contact" that occurred when the police removed the drugs that Williams stashed near his genitals, noting that "some physical contact is permissible, and indeed unavoidable, when police reach into a suspect's pants to remove drugs the suspect has chosen to hide there." *Id.* at 996.

Many other courts, like *Williams* and the dissent here, (App. 41a), have similarly held that a reach-in search with justification is reasonable. *See United States v. Williams*, 209 F.3d 940, 943-44 (7th Cir. 2000) (upholding on-scene search incident to arrest where police officer reached into the back of Williams's undershorts and removed a plastic bag containing cocaine from between Williams's buttocks); *United States v. McKissick*, 204 F.3d 1282, 1296-97 (10th Cir. 2000) (upholding seizure of narcotics from arrestee's crotch area inside pants); *United States v. Ashley,* 37 F.3d 678, 682 (D.C. Cir.1994) (upholding search of drug suspect that involved officer opening individual's pants and seizing a bag of drugs inside his underwear), *cert. denied*, 513 U.S. 1181 (1995); *Jenkins*, 842 A.2d at 1156-58 (upholding search where officer seized contraband after pulling pants and underwear away from arrestee's body); *People v. Butler*, 813 N.Y.S.2d 366, 369 (N.Y. App. Div. 2006) (upholding search where police loosened and lowered arrestee's pants and underwear for a brief time and to a minimal degree in order to retrieve cocaine sitting atop arrestee's buttocks), *lv. dismissed*, 850 N.E.2d 675 (N.Y. 2006); *State v. Smith,* 464 S.E.2d 45, 46 (N.C. 1995) (upholding on-scene search for drugs where officer pulled open arrestee's pants and underwear and reached in to retrieve drugs), *cert. denied*, 517 U.S. 1189 (1996).

Thus, the characterization of a search as a strip search or a reach-in search is important in the assessment of the reasonableness of an on-scene search incident to arrest. There is substantial conflict among lower courts, however, regarding what constitutes a strip search. A significant number of lower courts, like the dissent here, (App. 30a-

41a), embrace the traditional notion that a strip search involves the removal of clothing followed by an inspection of a naked individual. *Wood v. Hancock County Sheriff's Department*, 354 F.3d 57, 63 (1st Cir. 2003); *Williams*, 209 F.3d at 943-44; *Marriott v. County of Montgomery*, 426 F.Supp.2d 1, 7 n.7 (N.D.N.Y. 2006); *Schmidt v. City of Lockport*, 67 F.Supp.2d 938, 944-45 (N.D. Ill. 1999); *Bobbit v. State*, 394 S.E.2d 385, 386 (Ga. App. 1990); *Commonwealth v. Prophete*, 823 N.E.2d 343, 350 (Mass. 2005); *Butler*, 813 N.Y.S.2d at 369; *McCloud v. Commonwealth*, 544 S.E.2d 866, 868-69 (Va. App. 2001).

Other courts, like the majority of the Maryland court, have found searches to be strip searches even if none of the subject's clothes has been removed. (App. 15a) (noting that strip searches occur when the mere rearranging of clothes results in the visualization of a person's "skin surfaces of the genital areas, breasts, and/or buttocks"); *accord Amaechi v. West*, 237 F.3d 356, 365 (4th Cir. 2001) (citing to Virginia statute indicating that strip search includes removal or arranging of "some or all of clothing to permit visual inspection of genitals, buttocks, anus, female breasts, or undergarments of such person"); *Fernandors v. District of Columbia*, 382 F.Supp.2d 63, 73-75 (D.D.C 2005) (assuming that search inside arrestee's pants constituted a strip search); *Jenkins*, 842 A.2d at 1156-58 (holding that pulling arrestee's pants and underwear away from body was akin to a strip search).

Indeed, the assessment of the scope and manner of the intrusion in this case was a critical difference in the majority and the dissenting opinions. The majority opinion found the scope and manner of the search to be highly invasive because the search was both a strip search

and a visual body cavity search, (App. 16a), whereas the dissent concluded that the search of Paulino was neither a strip search nor a body cavity search given that none of Paulino's clothes was removed to effect the search, (App. 29a-41a). That these reasoned jurists can reach such fundamentally different conclusions regarding the scope and manner prong of the *Bell v. Wolfish* test exemplifies the divide on this issue among lower courts and underscores the need for guidance from this Court.

B. The Maryland Court of Appeals' decision deepens an existing conflict over whether searches underneath a suspect's clothes may be conducted at the scene of the arrest.

Another conflict among the lower courts, which is reflected in the majority and dissenting opinions in this case, involves the weight to be given the last of the *Bell v. Wolfish* factors, the place where the search is conducted. Several lower courts, like the Maryland Court of Appeals, have concluded that the test essentially proscribes a search underneath clothing that could possibly be viewed by others, which virtually precludes any such searches at the scene of the arrest. (App. 25a-26a) (holding that strip search at scene was not justified where subject could conceivably be observed by members of the public); *Thompson v. State*, 824 N.E.2d 1265, 1269-71 (Ind. App. 2005) (holding unconstitutional strip search incident to arrest that occurred in front of camerawoman who filmed the search), *transfer denied*, 841 N.E.2d 176 (Ind. 2005); *People v. Mitchell*, 768 N.Y.S.2d 204, 206-07 (N.Y. App. Div. 2003) (holding unconstitutional a strip search that

occurred on a public street and noting that strip searches in public places are never reasonable unless there exist "circumstances that pose potentially serious risks to the arresting officer or others in the vicinity").

Other courts, like the dissenters here, have upheld as reasonable reach-in searches or strip searches that occurred in a public setting, such as the scene of the arrest, as long as the search was justified, and the police took appropriate measures to protect the privacy interests of the subject. (App. 42a-46a) (opining that justified reach-in search conducted at scene was reasonable where circumstances indicated that no one other than searching officers could observe suspect's private area); *United States v. Cofield*, 391 F.3d 334, 337 (1st Cir. 2004) (upholding reasonableness of strip search conducted in the hallway of the police station); *McKissick*, 204 F.3d at 1296-97 (upholding seizure of narcotics from arrestee's crotch area inside pants prior to transporting arrestee to station); *Williams*, 209 F.3d at 943-44 (upholding on-scene reach-in search incident to arrest); *Ashley*, 37 F.3d at 682 (upholding search of drug suspect that occurred around the side of a bus station); *Jenkins*, 842 A.2d at 1156-58 (upholding on-scene reach-in search for contraband incident to arrest for felony narcotics offense); *Butler*, 813 N.Y.S.2d at 369 (upholding on-scene reach-in search); *Smith*, 464 S.E.2d at 46 (upholding on-scene reach-in search).

This was the conclusion reached by the Eighth Circuit in *Williams*, wherein the court upheld a search conducted in a parking lot surrounded by a residential neighborhood. The court reasoned that the officers had a "legitimate need to seize contraband that Williams had chosen to carry in

his underwear," and they took sufficient precautions to protect Williams's privacy. 477 F.3d at 977.

> The police refrained from searching Williams on a public street, and instead took him to the more private precinct parking lot. . . . To the extent any citizen observed the search without notice of the police, there is no evidence that such a person would have seen the private areas of Williams's body or any contact between the gloved hand of the officer and Williams's genitals, which remained obscured from the view of passers-by. Rather, the citizen would have observed from a distance that an officer briefly reached inside Williams's pants and pulled out a bag of cocaine.

Id. The court concluded that such a search did not unreasonably infringe on Williams's privacy interests "when balanced against the legitimate needs of the police to seize contraband that he carried on his person." *Id.* at 977-78.

In the end, although this Court set out in *Bell v. Wolfish* factors to consider in determining whether a strip search or reach-in search is reasonable, there are conflicts among the lower courts regarding how to assess these factors.[5] The

---

[5] Although there was no dispute in this case that the police had justification for the search, there is conflict among the lower courts regarding the justification prong of the *Bell v. Wolfish* test, specifically the level of justification required for a strip search incident to arrest. Some courts require reasonable suspicion that the arrestee is concealing weapons or contraband on his or her person. *Edwards v. State*, 759 N.E.2d 626, 629 (Ind. 2001) (need

reality of the inconsistent opinions in the lower courts is that street level police are placed in the eminently precarious position of not knowing the full scope or the limits of their arrest powers. The present case can be used to provide appropriate guidance to the courts and the police on these critically important and currently unresolved issues.

II. The Maryland Court of Appeals' decision is erroneous.

The search conducted in this case struck the appropriate balance between the need for the particular search and the invasion of personal rights. *See Bell v. Wolfish*, 441 U.S. at 559. The officers in this case were told by a reliable source that Paulino would hide the drugs between his buttocks; after lawfully arresting Paulino, the officers simply reached in and retrieved the drugs from

---

reasonable suspicion of concealed weapons or contraband to strip search arrestee charged with traffic offense); *Nieves*, 383 Md. at 596-97 (same); *People v. Kelley*, 762 N.Y.S.2d 438, 440 (N.Y. App. Div. 2003) (same), *lv. denied*, 808 N.E.2d 366 (N.Y. 2004). Other courts require probable cause developed independent of the arrest itself. *See Fuller*, 950 F.2d at 1446 (holding that strip and visual body cavity searches with less than probable cause only permitted to protect institutional security and safety; search for evidence must be justified by probable cause); *Commonwealth v. Thomas*, 708 N.E.2d 669, 673 (Mass. 1999) (probable cause necessary to conduct strip or visual body cavity search).

there. Given the limited intrusiveness of such a search, weighed against the need of the police to seize drugs they reasonably believed were secreted on Paulino's body, and the absence of any gratuitous or unnecessary action taken by the police, the search here was reasonable.

In finding that the search of Paulino was unreasonable under the Fourth Amendment, the Maryland Court of Appeals erred in several respects. Initially, the majority opinion stressed a lack of exigency, (App. 12a-13a, 18a-19a, 21a, 25a), which is not a factor in the standard of reasonableness pronounced by this Court in *Bell v. Wolfish*. Moreover, the Court improperly assessed the scope and manner of the intrusion, by characterizing the search as a highly intrusive strip search and visual body cavity search. (App. 16a). Finally, with respect to the last factor under *Bell v. Wolfish*, the majority opinion placed too much weight on the fact that the search occurred in a public place. (App. 17a-26a). As noted by the dissent, the majority opinion established a *per se* rule that on-scene strip searches incident to an arrest must be conducted in an enclosed area, (App. 42a), a rule that is in conflict with the balancing test set forth in *Bell v. Wolfish* and with the lower courts that have upheld searches of similar kind. This Court should grant review of the lower court's decision not only to correct the lower court's error, but to ensure that other courts do not similarly condemn entirely proper police conduct.

A review of each of the *Bell v. Wolfish* factors shows that the search here was reasonable. With respect to the justification for the search, the police had reliable information that Paulino was concealing illegal narcotics between his buttocks cheeks. Both the majority and

dissenting opinions agreed that this reliable information justified a search of that area of his person incident to his arrest. (App. 20a-21a) (noting that the question was not whether a search was justified, but whether such an invasive search at the scene of the arrest was reasonable in the absence of exigency); (App. 42a-46a) (recognizing that all *Bell v. Wolfish* factors, including justification to search, were met in this case).

The majority's addition of an "exigency" requirement, however, (App. 13a, 17a-26a), finds no footing in the *Bell v. Wolfish* test.[6] Moreover, the conclusion that no exigency existed ignores the reality faced by the police effecting an arrest for narcotics offenses. As the cases cited herein prove, it is not uncommon for a narcotics trafficker to conceal contraband or weapons on his or her person. Conducting an immediate seizure at the scene was the most reasonable course of action because it eliminated the possibility that the evidence of criminal behavior would be lost or destroyed. *Williams*, 477 F.3d at 976 (while the potential for destruction of evidence is diminished when a suspect is in custody, it is not completely eliminated, which makes immediate seizure

---

[6] The majority's conclusion in this regard likely evolved from its mistaken classification of the search as a visual body cavity search, which the search clearly was not. *See Winston v. Lee*, 470 U.S. 753, 759-60 (1985) (citing *Schmerber v. State of California*, 384 U.S. 757, 769-70 (1966), for the proposition that probable cause of criminal action and exigent circumstances obviated need to obtain warrant for intrusion beneath the skin of the suspect).

reasonable). Because the search conducted on Paulino was no more intrusive than was necessary to accomplish the goal of seizing the contraband, it was lawful. *See, e.g., United States v. Robinson*, 414 U.S. at 236 (recognizing that the justification for conducting search incident to arrest is to disarm suspect and to "preserve evidence on his person for later use at trial. . . .").

With respect to the scope and manner of the search, it was not a highly intrusive search. Rather, it was limited only to that action necessary to retrieve the contraband that Paulino had purposefully concealed on his person. When Paulino arrived at the secluded car wash at 11:15 p.m., the police removed him from his vehicle, placed him on the ground, and, because his pants were worn very low, merely lifted up his boxer shorts. (App. 2a-5a, 29a-30a). When Paulino refused to release the tension on his buttocks cheeks, an officer reached in to secure the drugs, but this was a necessary tactic to secure the contraband. There is absolutely no evidence of any gratuitous or unnecessary action taken by the police, and there was no evidence that anyone other than the searching officer saw Paulino's buttocks. *See Cofield*, 391 F.3d at 337 (upholding reasonableness of strip search conducted in the hallway of the police station where the search was conducted in a professional manner and officers did not require arrestee to assume humiliating poses, expose himself unnecessarily to the public or to members of the opposite sex, remain exposed for an unreasonable duration, or endure any degradation or ridicule); *McGee v. State*, 105 S.W.3d 609, 613-17 (Tex. Crim. App.) (upholding a strip search occurring in a fire station on the basis that the search was justified and was conducted in a

manner that sufficiently protected "the privacy interests of McGee"), *cert. denied*, 540 U.S. 1004 (2003).

With respect to the last *Bell v. Wolfish* factor, the place of the search, that the search occurred in a public place did not, as the majority held, make the search unreasonable. The search occurred in a bay of a deserted car wash, which was itself in a secluded location, away from general traffic. (App. 3a-4a, 45a; 56a-57a). Although there was testimony indicating that other officers and Paulino's cohorts were present at the scene, there was no evidence that any of these persons could see Paulino's genitalia or buttocks. (App. 45a). Paulino's pants were kept in place during the search. (App. 5a; 45a, 54a). Thus, the situs of the search, in this case, did not undermine its reasonableness. *Compare Williams*, 477 F.3d at 977 (upholding justified reach-in search conducted in parking lot of police precinct), *with United States v. Ford*, 232 F. Supp.2d 625, 630 (E.D. Va. 2002) (declaring strip search unreasonable where it involved "revealing [the suspect's] naked body below his buttocks . . . in broad daylight on the side of the George Washington Parkway, a heavily traveled road . . . at the tail end of rush hour"). The *per se* rule adopted by the Maryland Court of Appeals is inconsistent with the balancing approach set forth in *Bell v. Wolfish*. *See Williams*, 477 F.3d at 977 (holding that district court's "bright-line rule," which required that intimate search be conducted at precinct whenever possible, was inconsistent with the *Bell v. Wolfish* balancing test).

The majority's assessment that the search could have been conducted more discretely inside a vehicle or at the police station, (App. 25a-26a), is misguided. Even

assuming that were the case, this Court has made clear that government action does not become *per se* unlawful simply because a less intrusive means exists. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995) ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."); *Illinois v. Lafayette*, 462 U.S. at 646 (holding that the reasonableness of government action does not turn necessarily on the existence of a less intrusive means).

Rather, where, as here, there was ample justification for a search of this scope, the search was conducted in an appropriate manner, and the search was conducted in a place that, given the circumstances, did not unreasonably compromise Paulino's privacy rights, the search was lawful under the Fourth Amendment. *Bell v. Wolfish*, 441 U.S. at 559; *see also Illinois v. Lafayette*, 462 U.S. at 647 (recognizing that, as long as the governmental interest outweighs the intrusion into privacy, there is no need to consider the existence of less intrusive means).

III. This is an important and recurring issue.

The cases cited herein confirm that lower courts continually are confronted with the task of determining the reasonableness of searches incident to arrest of intimate areas underneath a suspect's clothing. The absence of guidance from this Court on this critical Fourth Amendment issue has led to decisions, like that of the Maryland Court of Appeals, that not only prevent the police from taking the prompt, reasonable, and effective crime fighting measures this Court authorized in cases

such as *United States v. Robinson* and *Chimel v. California*, but also provide the reverse incentive for drug dealers to conceal contraband in the most intimate areas of their person in order to prevent detection of the contraband and eventual prosecution. *See Scott v. Harris*, 127 S.Ct. 1769, 1779 (2007) (declining to effect a rule requiring police to curtail pursuit that would have created the "perverse" incentive to flee police at high rates of speed).

The decision of the Court of Appeals of Maryland represents a misapplication of Fourth Amendment jurisprudence to the facts of the case, and its continued vitality will serve only to undermine reasonable and effective methods of law enforcement. This Court should grant review and reverse the judgment of the lower court.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
EDWARD JOHN KELLEY
Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*
August 31, 2007

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A:

Reported opinion of the Court of Appeals of Maryland, *Paulino v. State*, 399 Md. 341, 924 A.2d 308 (2007) (filed June 4, 2007) ..... 1a - 48a

APPENDIX B:

Unreported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. John August Paulino*, No. 223, September Term, 2004, (filed July 12, 2006) ..... 49a - 58a

APPENDIX C:

Transcript of Proceedings in the Circuit Court for Baltimore County, Maryland, on June 18, 2001, in *State of Maryland v. John August Paulino*, No. 00CR3812 ..... 59a -61a

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 75

September Term, 2006

JOHN AUGUST PAULINO

v.

STATE OF MARYLAND

Bell, C.J.
Raker
Cathell
Harrell
Battaglia
Greene
Wilner, Alan M. (Retired, Specially Assigned),

JJ.

Opinion by Greene, J.
Cathell, Battaglia and Wilner, JJ., Dissent.

Filed: June 4, 2007

This case requires us to consider whether a search conducted incident to an arrest is reasonable under the Fourth Amendment in light of the manner and place in which the search was conducted at a time when there were no exigent circumstances justifying the immediate search. We conclude that, under the circumstances of this case, the search of petitioner was unreasonable. Accordingly, we shall reverse the judgment of the Court of Special Appeals.

I.

Factual and Procedural Background

On September 29, 2000 Detective Elliot Latchaw, and other members of the Baltimore County Police Department received information from a confidential informant who told them that later that evening, petitioner, John August Paulino ("Paulino"), would be in the 1100 block of North Point Road, Dundalk, Maryland, and would be in possession of a quantity of controlled dangerous substance. The informant also advised the police that Paulino typically hides the controlled dangerous substance in the area of his buttocks. Acting on the information provided by the informant, the police established surveillance in the 1100 block of North Point Road. At the suppression hearing, Detective Latchaw described the surveillance in greater detail:

> [Detective Latchaw]: He actually - we had surveillance established on the parking lot, and he was actually observed on the parking lot, and he was

actually observed by myself as they pulled into the entrance to the car wash. He was seated in the passenger seat. I saw him clear as day, and I radioed real quick to everybody, this is him, he's in the passenger seat. And at that time, they actually pulled [into one of] the bays of the car wash. There's like maybe six or eight bays all away across in the line. When they pulled in, they were blocked in, and he was removed from the vehicle. And I don't know exactly how he was taken out of the vehicle or if he got out on his own, I don't know, because at that point, I was back a little ways coming up. There was a — there was a team to do all that.

* * * *

There was also testimony describing the location of the search:

[Defense Counsel]: Is that area of Dundalk fairly busy at that time of night?

[Detective Latchaw]: Not at all. Its actually - the car wash is actually back - you pull into a parking lot, and you've got to go past an entrance to a storage facility, like those little mini storage buildings, and actually go past a - like an auto repair center. And then at the very end of this little parking lot, it's kind of like a zigzaggy entrance. Driveway kind of turns around to the left and comes back to the right, and the very back is the car wash all by itself. It's real secluded back there actually.

[Defense Counsel]: Were there any other people back there at that time around eleven-fifteen that evening other than yourself and Mr. Paulino?

[Detective Latchaw]: No, not that I – not that I can remember.

[Defense Counsel: Yourself –

[Detective Latchaw]: Well, other units of Baltimore County Police. Right.

[Defense Counsel]: No civilian personnel?

[Detective Latchaw]: No. Nobody was washing their cars, that I can remember.

[Defense Counsel]: Is that a lighted area, dark area?

[Detective Latchaw]: Well lit.

[Defense Counsel]: Is that viewable by people in the area walking by or not really?

[Detective Latchaw]: No. No, it's way back. It's back off the road. It's real secluded.

* * * *

The testimony regarding the police officer's subsequent actions is less clear:

[Defense Counsel]: And you did conduct a search then, is that correct? How did you come to find the drugs?

[Detective Latchaw]: Well, when we - when Mr. Paulino was removed from the vehicle and laid on the ground, his pants were already pretty much down around his - below his butt, because I guess that's the fad, these guys like wearing their pants down real low, so it was just a matter of lifting up his shorts, and - - and between his butt cheeks the drugs were - I believe one of the detectives actually put on a pair of gloves and just spread his cheeks apart a little bit and it was right there.

[Defense Counsel]: So they were not visible before you actually spread his cheeks apart, is that correct?

[Detective Latchaw]: I don't think they were.

* * * *

Paulino offers a slightly different version of the facts concerning the search:

[Defense Counsel]: Where was the search conducted?

[Mr. Paulino]: Inside a car wash

[Defense Counsel]: In the presence of other people or by yourself?

[Mr. Paulino]: Other people was around. It was about 12 other officers.

[Defense Counsel]: At that time, your - your anal cavity was searched. Is that correct?

[Mr. Paulino]: They had searched me in my pockets, didn't find nothing, and eventually, they came to the subject where - in my report, it states that the officer said, Mr. Paulino, why is your butt cheeks squeezed? And in further response, I said nothing. He said it again, and another officers come behind with gloves and pulled my pants down and went in my ass. Well, my cheeks. Sorry about that.

Paulino was charged with possession with intent to distribute cocaine and possession of cocaine. Subsequent to his arrest, Paulino filed a motion to suppress, which, following a hearing on the motion, was denied. Proceeding on an agreed statement of facts, the trial judge found Paulino guilty of possession with intent to distribute, and sentenced him as a subsequent offender, to a mandatory ten-year sentence.

On September 12, 2003, Paulino filed a petition for post conviction relief. The post conviction court granted Paulino the right to file a belated appeal. Paulino, in turn, filed a notice of appeal. Thereafter, in an unreported opinion, the Court of Special Appeals affirmed the judgment of the Circuit Court. On August 21, 2006, Paulino filed a petition for writ of certiorari, which we

granted.[1] *John August Paulino v. State of Md.*, 395 Md. 420, 910 A.2d 1061 (2006).

II.

Standard of Review

We are asked in this appeal to review the Circuit Court's denial of Paulino's motion to suppress. "Our review of a circuit court's denial of a motion to suppress evidence, ordinarily, is limited to the evidence presented at the suppression hearing. *See Ferris v. State*, 355 Md. 356, 368, 735 A.2d 491, 497 (1999). Thus, we refrain from engaging in *de novo* fact-finding and looking at the trial record for supplemental information." *Carter v. State*, 367 Md. 447, 457, 788 A.2d 646, 651(2002). We view the evidence presented at the hearing on Paulino's motion to suppress, and all reasonable inferences drawn from that evidence, in the light most favorable to the State.

---

[1] Petitioner presents the following question for review:

> Did the search of Petitioner, which involved an officer putting on plastic gloves and spreading the cheeks of Petitioner's buttocks to reveal drugs which were not visible before that time, violate the Fourth Amendment, when the search was conducted in the parking lot of a car wash in the presence of individuals other than the searching officer?

See Carter, 367 Md. at 457, 788 A.2d at 651; *Scott v. State*, 366 Md. 121, 143, 782 A.2d 862, 875 (2001); *Riddick v. State*, 319 Md. 180, 183, 571 A.2d 1239, 1240-1241 (1990).

It is well established that the State has the burden of proving the legality of a warrantless search and seizure. *See Sifrit v. State*, 383 Md. 77, 114, 857 A.2d 65, 86 (2004) ("[t]he ultimate burden of proving that evidence seized without a warrant should not be suppressed falls on the State"(quoting *State v. Green*, 375 Md. 595, 826 A.2d 486 (2003))); *State v. Bell*, 334 Md. 178, 191, 638 A.2d 107, 114 (1994)(noting that warrantless searches are presumptively unreasonable and that "the burden of proving the applicability of an exception to the warrant requirement rests on the State"); *Stackhouse v. State*, 298 Md. 203, 217, 468 A.2d 333, 341 (1983) (emphasizing "that the burden of establishing exigent circumstances is on the State and that the facts and circumstances upon which the question of reasonableness depends must be viewed in light of established Fourth Amendment principles"). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971) (holding that "there must be a showing by those who seek exemption [from the requirements of the Fourth Amendment] that the exigencies of the situation made that course imperative. The burden is on those seeking the exemption to show the need for it.").

As this Court noted in *State v. Nieves*, 383 Md. 573, 581-82, 861 A.2d 62, 67 (2004),

"[a]lthough we extend great deference to the hearing judge's findings of fact and will not disturb them unless clearly erroneous, we review, independently, the application of the law to those facts to determine if the evidence at issue was obtained in violation of the law and, accordingly, should be suppressed."

III.

Discussion

A.

Fourth Amendment and Search Incident to Arrest

In support of his challenge to the validity of the search, Paulino relies on the Fourth Amendment to the United States Constitution. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment is made applicable to Maryland through the Fourteenth Amendment, and prohibits searches that are "unreasonable under the circumstances." *Nieves,* 383 Md. at 583, 861 A.2d at 68. In *Nieves,* we noted that "it is well established

that warrantless searches are *per se* unreasonable under the Fourth Amendment absent some recognized exception." 383 Md. at 583, 861 A.2d at 68. *See also Illinois* v. *Rodriguez,* 497 U.S. 177,185, 110 S.Ct. 2793, 2799, 111 L.Ed.2d. 148,156-57 (1990). The Supreme Court of the United States has, however, recognized the authority of the police to search an arrestee incident to a lawful arrest, *see United States v. Robinson*, 414 U.S. 218, 224-26, 94 S.Ct. 467, 471, 38 L.Ed.2d 427, 434 (1973); as have we, *State v. Evans,* 352 Md. 496, 516, 723 A.2d 423, 432-33 *cert. denied,* 528 U.S. 833, 120 S.Ct. 310, 145 L.Ed.2d. 77 (1999).

In *Evans,* 352 Md. at 515, 723 A.2d at 432, we held that to execute a lawful arrest "a police officer must have probable cause to believe the suspect has committed a felony and must either physically restrain the suspect or otherwise subject the suspect to his or her custody and control." Because Paulino does not challenge the validity of his arrest, the only issue before the Court is the scope of the search under the circumstances.[2]

---

[2] It remains unclear whether Paulino's pants were below his waist as a result of his removal from the vehicle in the course of the arrest, or, whether Paulino intentionally wore his pants below his waist as a part of a fad. Even if Paulino intentionally wore his pants below his waist and his undergarments were exposed , we conclude that because Paulino's pants were below his waist he retained, nevertheless, a Fourth Amendment right to privacy in his person. *See generally United States v.*

(continued...)

Police are allowed to conduct a search incident to an arrest in order "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape . . . [or] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685, 694. In *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Supreme Court explained the scope of a search incident to an arrest in light of its decision in *Chimel.* The issue before the Court in *Robinson* was whether after a custodial arrest, a police officer could conduct a full search of the arrestee or, in the alternative, if the scope of a search incident to arrest is limited to a frisk of the outer clothing. The Court held that a search of an arrestee's waist, pants, pockets, as well as the contents of the arrestee's pockets, supports "the need to disarm the suspect in order to take him into custody" as well as "the need to preserve the evidence on his person for later use at trial" and is therefore permissible under Fourth Amendment law. *Robinson,* 414 U.S. at 234, 94 S.Ct. at 476, 38 L.Ed.2d at 440.

The rationale of *Chimel* and *Robinson* entitles the police, under the Fourth Amendment, to conduct a full search incident to arrest, without a warrant, so long as the search does not involve a bodily intrusion. *See Schmerber v. California,* 384 U.S. 757, 769, 86 S.Ct. 1826, 1835, 16

---

[2](...continued)
Dorlouis, 107 F.3d 248 (4th Cir. 1997); *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

L.Ed.2d 908, 919 (1966). *In Schmerber,* the Court held that the Fourth Amendment protects an arrestee's privacy interests in his person and prohibits bodily intrusions that "are not justified in the circumstances, or which are made in an improper manner." 384 U.S. at 768, 86 S.Ct. at 1834, 16 L.Ed.2d at 918. We note, however, as we did in *Nieves, supra,* that "the Supreme Court has not [specifically] addressed the validity of strip searches incident to an arrest." 383 Md. at 585, 861 A.2d at 69. *See Illinois v. Lafayette,* 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983).

Notwithstanding the Supreme Court's failure to address the validity of strip searches incident to an arrest, we acknowledged in *Stackhouse, supra,* that "the rule developed in *Chimel* was based on an exigency rationale, that is, the safety of the officer and the preservation of evidence[,]" and that "[t]he justification, however, remains a narrow one." *Stackhouse v. State,* 298 Md. at 211-212, 468 A.2d at 338. In addition, we explained that a warrantless search cannot be justified on the basis that the officers had probable cause, "because that is the very determination for which the constitution requires a warrant hearing." *Stackhouse,* 298 Md. at 219, 468 A.2d at 342.

Here the police had reason to believe that Paulino carried drugs on his person and under his clothing, but that fact was not the justification for the search. Paulino's arrest served as justification for the search *incident* and the underlying probable cause for his arrest was never challenged. The actual challenge, however, is to the search of Paulino. He contends that the search constituted

a strip search. By definition a strip search involves a more invasive search of the person as opposed to a routine custodial search. Therefore, the necessity for such an invasive search must turn upon the exigency of the circumstances and reasonableness. Without the constitutional safeguards of exigent circumstances and reasonableness, every search incident could result in a strip search. As we have said, "[t]he meaning of exigent circumstances is that the police are confronted with an emergency--circumstances so imminent that they present an urgent and compelling need for police action." *Stackhouse,* 298 Md. at 219-220, 468 A.2d at 342. Therefore, we must determine whether the circumstances of the search in the present case rise to that level.

B.

Strip Searches and Body Cavity Searches

Paulino contends that, at a minimum, the search conducted here was a strip search. In Paulino's view, the search "was more intrusive than a mere strip search" because the cheeks of his buttocks were manipulated by the police. Paulino asserts that "by spreading apart the cheeks of [his] buttocks" the search was beyond the realm of a strip search and, instead, was a "visual body cavity search." In response, the State contends that the search of Paulino occurred "without removing any of Paulino's clothing" and that the "search arguably did not . . . constitute a 'strip search.'" Further, according to the State, "the police action. . . did not constitute a visual or manual 'body cavity search'" because, to retrieve the contraband,

the police officers only lifted up Paulino's shorts. For reasons discussed, *infra,* we conclude that the search of Paulino was both a strip search and a visual body cavity search.

There exist three separate categories of searches. As the United States Court of Appeals for the First Circuit noted in *Blackbum v. Snow,* 771 F.2d 556 (1st Cir. 1985), n. 3.:

> A "strip search," though an umbrella term, generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities. A "visual body cavity search" extends to a visual inspection of the anal and genital areas. A "manual body cavity search" includes some degree of touching or probing of body cavities.

See Nieves, 383 Md. at 586, 861 A.2d at 70[3]

---

[3] In accord, one attorney commentator, William J. Simonitsch, notes that there are "three distinct categories" of body cavity searches: strip searches, visual body cavity searches and manual body cavity searches. Mr. Simonitsch defines a strip search as involving the removal of clothing for inspection of the under clothes and/or body and "includ[ing] only those searches that do not involve a visual or manual inspection of the genitals or anus"; visual body cavity search "include[s] only searches where there is a visual inspection of a person's genitals or anus, but no physical contact or intrusion"; manual body cavity search includes "not only those [searches] performed by insertion

(continued...)

(acknowledging that a strip search is "any search of an individual requiring the removal or rearrangement of some or all clothing to permit the visual inspection of the skin surfaces of the genital areas, breasts, and/or buttocks." The Court noted that "[t]here is a distinction between a strip search and other types of searches, such as body cavity searches, which could involve visually inspecting the body cavities or physically probing the body cavities"); *McGee v. State,* 105 S.W.3d 609, 615 (Tex. Crim. App. 2003) (holding that when the arrestee was forced to drop his pants, bend over, and spread his buttocks and the crack cocaine recovered was in plain view and was lodged between the arrestee's buttocks, the search was a visual body cavity search); *Hughes v. Commonwealth of Va.,* 524 S.E.2d 155,159 (Va. Ct. App. 2000) (holding that the arrestee was subjected to all three types of searches when the arrestee was disrobed, directed to bend over and expose his anus, cough in order to expand the officer's view of the anus, and when a plastic bag was subsequently removed from the arrestee's anal cavity). *See also Amaechi v. West,* 237 F.3d 356, 363-64 (4th Cir. 2001); *United States v. Dorlouis,* 107 F.3d 248, 256 (4th Cir. 1997); *United States v. Vance,* 62 F.3d 1152, 1156 (9th Cir. 1995).

---

[3](...continued)
of, or manipulation with, the fingers, but also endoscopic examinations and the use of gynecological devices." William J. Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment,* 54 U. Miami L. Rev. 665, 667-68 (2000).

Based upon the record before us, we conclude that the police officers' search of Paulino was both a strip search and a visual body cavity search. It appears that the police officers attempted to manipulate Paulino's clothing in such a manner that his buttocks could be more readily viewed. In this instance, the police did not only lift up Paulino's shorts, but also the officers manipulated his buttocks to allow for a better view of his anal cavity. If, in the case *sub judice,* the drugs were protruding from between the cheeks of Paulino's buttocks and visible without spreading his buttocks cheeks, the classification of the type of search would be a close one.[4] In this case, however, the drugs were not visible until after the cheeks of Paulino's buttocks were spread apart. Therefore, when the police officers spread the cheeks of Paulino's buttocks to inspect his anal cavity and, upon doing so, observed a plastic bag containing drugs, their conduct amounted to a "visual body cavity search."[5]

---

[4] The dissent seeks to adopt a definition of strip search that is unduly restrictive. The application of that definition underestimates the degree to which the search invaded Paulino's personal privacy. Moreover, the cases cited by the dissent in support of its contention that the search of Paulino was a "reach-in" search are distinguishable because they do not relate to the manipulation of the intimate parts of a suspect's person.

[5] As the Texas Court of Criminal Appeals noted in *McGee v. State,* 105 S.W.3d 609, 616 (Tex. Crim. App. 2003), "[v]isual body-cavity searches are among the most

(continued...)

C.

Reasonableness

Notwithstanding the search incident to arrest exception to the warrant requirement, the search conducted by the police must be reasonable in light of the exigencies of the moment. *See*, U.S. Const. amend. IV.; *Nieves,* 383 Md. at 583, 861 A.2d at 68. The fact that the police can lawfully initiate the search of a suspect does not then give the police carte blanche authority to conduct an unreasonable search. *See Bell v. Wolfish*, 441 U. S. 520, 558, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481 (noting that "[t]he Fourth Amendment prohibits only unreasonable searches"). The United States Supreme Court's decision in *Bell* sets forth the appropriate test for determining the reasonableness of a search. Judge Battaglia, writing for this Court in *Nieves, supra,* said that:

> In *Bell* [], "the Supreme Court addressed the permissible scope of searches incident to arrest that occurred in association with pretrial detention. [441 U.S.] at 523, 99 S.Ct. at 1866, 60 L.Ed.2d at 458. Several defendants brought a class action suit challenging detention policies requiring pre-trial

---

[5](...continued)
intrusive of searches. Its intrusiveness 'cannot be overstated.'"; *United States v. Lilly,* 576 F.2d 1240, 1246 (5th Cir.1978); *Patterson v. State,* 598 S.W.2d 265, 269 (Tex.Crim.App.1980); *Kennedy v. Los Angeles Police Dep't,* 901 F.2d 702, 711 (9th Cir.1989).)

detainees to be subjected to a "visual body cavity" search every time the detainee had contact with individuals outside of the institution. *Id.* The Court assessed the reasonableness of these searches by stating:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

383 Md. at 588, 861 A.2d at 71.

In the present case, the Court of Special Appeals concluded that three "of the four factors required to be balanced by *Bell* . . . all weigh in favor of the State." The appearance that three out of four factors weigh in favor of the State, however, does not, in and of itself, make a search reasonable. In our view, *Bell* requires a flexible approach, one that takes into account the relative strength of each factor. Further, *Bell* requires that a reviewing court, when assessing the reasonableness of a search under the Fourth Amendment, balance "the need for a particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559, 99 S.Ct. at 1884, 60 L.Ed.2d at 481. In that regard, we conclude that, on balance, the location of the search and the lack of exigency

made the search of Paulino unreasonable.

Accordingly, we turn first to the scope of the search in the instant case. Paulino contends that "the scope of the intrusion involved in the [search of his person] was great[,]" noting that he had to "suffer the indignity of having an officer view his naked body" as well as having to "endure the humiliation of having an officer physically manipulate his buttocks." The State makes no specific argument regarding the scope of the search, other than that the "'intrusion' into Paulino's buttocks cheeks area" was reasonable. The Court of Special Appeals held that the scope of the search was reasonable because the police "only had to 'lift up' [Paulino's] shorts briefly" and that "the entire search was as brief as possible." Even if we were to assume that the amount of time to conduct the search was brief, that factor, in our view, does not render the search reasonable under the circumstances where there was no exigency.

To determine reasonableness, we look to each of the factors delineated in *Bell,* and, after balancing each of the four factors, we make a determination of reasonableness. *See Bell,* 441 U.S. 520 at 559, 99 S.Ct. at 1884, 60 L.Ed.2d at 481. We hold that the police officers' search of Paulino,was highly intrusive and demeaning. The type of search that Paulino was subjected to, and other searches that "entail[] the inspection of the anal and/or genital areas have been accurately described as demeaning, dehumanizing, undignified, humiliating, embarrassing, repulsive, degrading, and extremely intrusive of one's personal privacy." *West*, 87 F.Supp.2d at 565.

We turn next to the second factor in the *Bell* analysis, justification for initiating the search. The State contends that there was justification for initiating the search "because the police had sufficient cause to believe that the illegal narcotics Paulino was known to be possessing were actually being concealed in that place." Citing our decision in *Nieves, supra,* the State argues that the "authority to conduct a search of this scope is virtually unassailable." Paulino offers no argument that the police officers' search of him was not justified. As this Court noted in *Nieves:*

> The Supreme Court in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), articulated the bases for a search incident to arrest, those being, "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape . . . [or] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763, 89 S.Ct. at 2040, 23 L.Ed.2d at 694; *see also United States v. Edwards,* 415 U.S. 800, 802-03, 94 S.Ct. at 1234, 1237, 39 L.Ed.2d 771, 775 (1974); *United States v. Robinson,* 414 U. S. 218, 226, 94 S.Ct. 467, 472, 38 L.Ed.2d 427, 435 (1973); *Carter,* 367 Md. at 460, 788 A.2d at 653.

383 Md. at 584, 861 A.2d at 68-69. Because a police officer can lawfully make a "full custodial search in order to support his general need to disarm a suspect or preserve evidence that may be in the individual's possession," we conclude that the police officers were justified in initiating the search of Paulino. *See Robinson, supra.* We do not

agree, as the State's argument suggests, that because the police had probable cause to arrest Paulino, the police were justified in searching him to the extent he was searched under the circumstances. The crux of this case, as illuminated *infra*, is not whether the police had the right to search Paulino, but instead whether an exigency existed such that an invasive search, conducted at the scene of the arrest, was reasonable.

Lastly, we examine the final two factors in the *Bell* analysis. We take into consideration the place and manner in which the search of Paulino was conducted. As to the place of the search, Paulino contends that the parking lot of a car wash is a "very public location [that was] within plain view of people who were not involved in the search itself." Further, Paulino contends that the presence of other people, who were not involved in the search of his person made this search exceptionally public and therefore unreasonable. The State contends that the search of Paulino was conducted in an appropriate manner because, in its view, "none of Paulino's clothes were removed, nor is there evidence that any part of his naked body was exposed unduly to any persons other than the searching officers. Paulino's pants were kept in place during the search . . . [and] [t]here is absolutely no evidence of any gratuitous or unnecessary action taken by the police." The State also argues that "the search occurred at night in the barricaded stall of . . . a 'secluded' car wash" and that no "part of Paulino's naked body was observed or was capable of being observed by anyone other than the searching officers, much less others at the scene or the general public."

The decisions of other jurisdictions are instructive. In *McGee,* police officers, acting on information from an informant approached McGee, suspecting that he was selling crack cocaine. As the police officers approached McGee they observed "marijuana smoke in the air above McGee and a marijuana cigarette on the ground next to him." *McGee,* 105 S.W. 3d at 614. The police arrested McGee, and drove him to a nearby fire station. In a secluded area of the station, McGee was ordered to "drop his pants, bend over, and spread his buttocks." *McGee,* 105 S.W.3d at 613. The officer then performed a "visual search of McGee's anal region." *Id.* The court concluded that the search of McGee amounted to a visual body inspection. To assess the reasonableness of the search of McGee, the court applied the four factors of the *Bell* analysis. In analyzing the place where the search was conducted, the court noted that "the search must be conducted in a hygienic environment where there is no risk of infection." *McGee,* 105 S.W. 3d at 617. Further, the court held that the searching officer acted appropriately to protect the privacy interest of McGee because he took him to a separate location within the firehouse that was more secluded. *Id.* (citing *Logan v. Shealy,* 660 F.2d 1007, 1014 (4th Cir. 1981) (noting that strip searches and body cavity searches involve such an intrusion that they should rarely be conducted in public places)).

The testimony from the suppression hearing in the case *sub judice,* viewed in the light most favorable to the State, does not indicate that the officers made any attempt to protect Paulino's privacy interests. The search was conducted in the very place in which he was arrested, a car

wash. Similarly, there is no indication in the record before us that the police made any attempt to limit the public's access to the car wash or took any similar precaution that would limit the ability of the public or any casual observer from viewing the search of Paulino. In our view, the search as conducted was unreasonable.

The United States Court of Appeals, Eighth Circuit, recently decided *United States* v. Williams, 477 F.3d 974 (8th Cir. 2007). In *Williams,* the police obtained a warrant to search Robert Lee Williams's home and his person. Prior to executing the warrant, the police conducted a traffic stop of Williams's vehicle. "A pat-down search revealed something inside Williams's pants, but the officers testified they decided not to search Williams more extensively while on the street because they were concerned about his privacy. Instead, they took Williams into custody, placed him in a squad car, and drove him several blocks to the police department's Fourth Precinct building." *Williams*, 477 F.3d at 975. The police then conducted a search of Williams in the parking lot of the police precinct, opening Williams's pants, reaching inside his underwear and retrieving contraband near his genitals. The court held that, in that instance, the search was not unreasonable. The court noted, however, that "there is no evidence that [a citizen] would have seen the private areas of Williams's body or any contact between the gloved hand of the officer and Williams's genitals, which remained obscured from the view of passers-by." *Williams*, 477 F.3d at 977.

We contrast the facts of *Williams* to the facts of the

present case. The search of Williams was a "reach-in"[6] type of search. Williams's pants were opened, but presumably kept on his waist, while the officer reached into his underwear and retrieved the contraband. In contradistinction, during the search of Paulino, his pants were below his waist, his underwear was "lifted up" and the cheeks of his buttocks were manipulated and exposed. In our view, the search of Paulino was far more invasive and, as a result, required a higher degree of privacy than the search conducted in *Williams*. Moreover, there is no evidence that the search of Paulino was shielded from the view of passers-by or the people present at the scene.

In the instant case, the State contends that because the search did not occur on the side of a well-traveled highway and was conducted at night; the search, therefore, was reasonable. The State appears to overlook that its failure to prove exigent circumstances and the reasonableness of the search are determinative. As we have noted previously, "the burden is on those seeking the exemption [from the warrant requirement] to show the need [for the search]." *See Coolidge,* 403 U.S. at 455, 91 S.Ct. at 2032, 29 L.Ed.2d at 576. There was no testimony at the suppression hearing in the case *sub judice,* that Paulino

---

[6] A "reach-in" search involves a manipulation of the arrestee's clothes such that the police are able to reach in and retrieve the contraband without exposing the arrestee's private areas. *See, U.S. v. Williams,* 477 F.3d 974 (8th Cir. 2007); *State v. Jenkins,* 842 A.2d 1148 (Conn. App. Ct. 2004); *McCloud v. Commonwealth,* 544 S.E.2d 866 (Va. Ct. App. 2001).

was attempting to destroy evidence, nor that he possessed a weapon such that an exigency was created that would have required the police officers to search Paulino at that precise moment and under the circumstances, in a "well-lit" public car wash. There is no dispute that members of the public were present, specifically, the other passengers in the Jeep Cherokee. It is their presence, whether their view was obscured or otherwise, that makes the search of Paulino unnecessarily within the public view and thus violative of the Fourth Amendment.[7] The police could have taken any number of steps, including patting Paulino down for weapons at the scene of the arrest and conducting the search inside the Jeep Cherokee vehicle in which Paulino was a passenger, or at the police station, to

---

[7] In support of its contention that the police took "reasonable precautions to protect Paulino's privacy interest," the dissent assumes facts that were not adduced at the suppression hearing. Specifically, the dissent incorrectly assumes that "no one saw Paulino's genitalia, and no one other than the searching officer saw Paulino's buttocks." Detective Latchaw's testimony at the suppression hearing simply does not support this contention. To the contrary, it is entirely conceivable that the search of Paulino was visible to any of the persons present at the scene of the arrest. There is no dispute that three of Paulino's associates were present as well as a team of Baltimore County police officers. Moreover, Detective Latchaw did not testify that the searching officer took any precautions to shield Paulino's body, particularly the obviously exposed part of his buttocks, from public view.

protect Paulino's privacy interest. Similarly, the police could have conducted the search in the privacy of a police van. *See Dorlouis*, 107 F. 3d at 256. During the transportation of Paulino from the scene of the arrest to the station or to a more private location, the police had the ability to secure Paulino to prevent his destruction or disposal of the contraband found on his person. Instead, they chose to search him in a public place in the view of others. Accordingly, we hold that the search of Paulino unreasonably infringed on his personal privacy interests when balanced against the legitimate needs of the police to seize the contraband that Paulino carried on his person.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. BALTIMORE COUNTY TO PAY THE COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS.

IN THE COURT OF APPEALS OF MARYLAND

No. 75

September Term, 2006

JOHN AUGUST PAULINO

v.

STATE OF MARYLAND

Bell, C.J.
Raker
Cathell
Harrell
Battaglia
Greene
Wilner, (Retired, Specially Assigned),

JJ.

Dissenting Opinion by Battaglia, J. which Cathell and Wilner, JJ., join.

Filed: June 4, 2007

I respectfully dissent.

The crux of the present case is whether the police's search of Paulino was reasonable under the Fourth Amendment.[1] The majority concludes that the search was both a highly intrusive strip search and a visual body cavity search and holds that the search was unreasonable, emphasizing the location of the search and the perception that there was a lack of exigency. I disagree that the search constituted a strip search or a visual body cavity search, and that the search was unreasonable.

A.

In *Nieves v. State*, 383 Md. 573, 861 A.2d 62 (2004), we addressed whether a strip search conducted incident to a lawful arrest for a minor traffic offense was reasonable under the Fourth Amendment. In that case, Nieves' clothes were removed and he was searched at a police station, resulting in the discovery of two small plastic baggies containing cocaine protruding from his rectum; we addressed what constitutes a strip search:

> The term "strip search" has been defined and used in differing contexts in Fourth Amendment jurisprudence. In general, strip searches involve

---

[1] The Fourth Amendment of the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

> the removal of the arrestee's clothing for inspection of the under clothes and/or body. Some have defined strip searches to also include a visual inspection of the genital and anal regions of the body. Black's Law Dictionary defines a strip search as "a search of a person conducted after that person's clothes have been removed, the purpose usually being to find any contraband the person might be hiding." . . . There is a distinction between a strip search and other types of searches, such as body cavity searches, which could involve visually inspecting the body cavities or physically probing the body cavities.

Id. at 586, 861 A.2d at 70 (citations omitted). Therefore, a strip search generally involves the removal of clothing and inspection of the naked body; a visual body cavity search entails a specific visual inspection of the anal or genital body cavity areas. In the present case, the search of Paulino was not a strip search, nor a body cavity search.

The evidence adduced at the suppression hearing reflected that police knew that Paulino would be traveling in a Jeep Cherokee near a car wash in the 1100 block of North Point Road in Dundalk around 11 p.m. on September 29, 2000, and that he would be in possession of a quantity of crack cocaine, secreted in his buttocks area between his butt cheeks. Based upon this information, the police arrested Paulino when he arrived at the car wash, placed him on the ground, and conducted the search, lifting up his boxer shorts, reaching between his butt cheeks and securing the baggie. Paulino was already

wearing his pants below his buttocks so that the officers found the drugs by simply "lifting up [Paulino's] shorts," but *not* by removing them:

> [COUNSEL FOR PAULINO]: And you did conduct a search then, is that correct? How did you come to find the drugs?
>
> [DETECTIVE LATCHAW]: Well, when we -- when Mr. Paulino was removed from the vehicle and laid on the ground, his pants were already pretty much down around his -- below his butt, because I guess that's the fad, these guys like wearing their pants down real low, so it was just a matter of lifting up his shorts, and between his butt cheeks, the drugs were -- I believe one of the detectives actually put on a pair of gloves and just spread his cheeks apart a little bit and it was right there.

The fact that Paulino's shorts were pulled away from his waist so that the searching officer could determine whether he had drugs secreted in his buttocks area does not render the intrusion a strip search or a visual body cavity search.

Rather, the search of Paulino was a "reach-in" search incident to a lawful arrest. In *United States v. Williams,* 477 F.3d 974 (8th Cir. 2007), after Williams was arrested, an officer opened his pants, reached inside his underwear, and recovered a large amount of drugs. The United States Court of Appeals for the Eighth Circuit distinguished strip

searches from "reach-in" searches, noting that unlike a strip search, a "reach-in" search does not involve the exposure of the suspect's private areas:

> To be sure, our cases suggest that police officers should "take precautions to insure that a detainee's privacy is protected from exposure to others unconnected to the search," *Jones v. Edwards,* 770 F.2d 739, 742 (8th Cir.1985), but *Jones*, like *Starks v. City of Minneapolis,* 6 F. Supp. 2d 1084 (D.Minn. 1998), analyzed whether police may conduct a strip search during which a suspect must expose fully his or her private areas. *Jones,* 770 F.2d at 740; *Starks,* 6 F. Supp. 2d. at 1088-1089. *In contrast, a reach-in search of a clothed suspect does not display a suspect's genitals to onlookers, and it may be permissible if police take steps commensurate with the circumstances to diminish the potential invasion of the suspect's privacy.*

Id. at 977 (emphasis added) (citations omitted). *See also United States v. Ashley,* 37 F.3d 678, 682 (D.C. Cir.1994) (officer opened individual's pants and discovered a bag from drugs inside his underwear); *United States v. Williams,* 209 F.3d 940 (7th Cir. 2000) (police officer conducted search wherein he reached into the back of Williams's undershorts and removed a plastic bag containing cocaine from between Williams's buttocks); *State v. Smith,* 464 S.E.2d 45, 46 (N.C. 1995) (officer searched individual by pulling open pants and underwear and reaching in to retrieve drugs). Therefore, a "reach-in"

search, or a search of a clothed suspect wherein the officer conducting the search reaches between an individual's clothing and his skin, without exposing the individual's genitalia to onlookers, is not the same as a strip search or visual body cavity search and its reasonableness is measured by its limited intrusiveness weighed against the needs of the police to seize drugs they believe are secreted on a suspect's body. *See Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481 (1979) ("The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."); *Nieves*, 383 Md. at 583, 861 A.2d at 68 ("In determining the reasonableness of a search, each case requires a balancing of the government's need to conduct the search against the invasion of the individual's privacy rights.").

In *Williams*, 209 F. 3d at 940, the police conducted a traffic stop of Williams's vehicle, after which they asked Williams to get out of his car and for consent to search his person. After Williams was arrested, he attempted to flee the scene; the police apprehended him, and an officer reached into the back of Williams's pants, within his undershorts, and removed a plastic bag containing cocaine from between his buttocks. Addressing whether the search was unreasonable, the United States Court of Appeals for the Seventh Circuit concluded that it was reasonable

because the search was not significantly more intrusive than necessary:

> Williams next argues that the "crack" seized from him should be suppressed because it was found when Officer Lewis "strip searched" him at the scene subjecting him to great humility and indignity. The district court, however, construed the search as a search incident to an arrest, not a strip search.
>
> * * *
>
> *Lewis retrieved the object by sliding his hand under Williams' waistband and down the back part of his pants. Williams was never disrobed or exposed to the public. The search occurred at night, away from traffic and neither officer saw anyone in the vicinity. Additionally, Williams' attempt to flee the scene and his physical resistance prior to the retrieval of the substance suggest that he would have tried to further conceal or dispose of the evidence had they not retrieved it immediately.*
> *In this case, the scope of the initial pat-down search by the officers was no more intrusive that which was already permitted. . . . The officers' seizure of the drugs did not add significantly to Williams' invasion of privacy.* Based on the officers' experience, the scope of the search, its justification and the place where it occurred, the district court did not clearly err in concluding the

> search of Williams was not overly intrusive and was correct in denying the motion to suppress.

Id. at 943-44 (emphasis added).

In *Williams*, 477 F.3d at 974, the United States Court of Appeals for the Eighth Circuit addressed a search wherein, on a police precinct parking lot surrounded by a residential neighborhood, an officer opened Williams's pants, reached inside his underwear, and removed a large amount of crack and powder cocaine. Assessing the reasonableness of the "reach-in" search, the court noted that "[t]here is no question that police were justified in searching inside Williams's pants [because] [t]he police possessed a warrant authorizing them to search his person for drugs and firearms, and an initial pat-down produced specific probable cause that Williams was hiding something inside his pants," and that the proper issue was "whether the search was reasonable in its scope, manner, and location." *Id.* at 975. In this respect, the court concluded that the search was reasonable, remarking that the officers took sufficient precautions to protect Williams's privacy:

> We believe that the officers took sufficient precautions to protect Williams's privacy before fulfilling their legitimate need to seize contraband that Williams had chosen to carry in his underwear. The police refrained from searching Williams on a public street, and instead took him to the more private precinct parking lot. The parking lot is partially secluded. It holds squad cars and the cars of police employees, and is

> surrounded by a chain link fence that is topped by barbed wire and covered to some degree with vegetation. The district court's findings of fact recounted uncontradicted testimony of police officer Randy Olson that no vehicles entered the lot during the search, and that he saw no person other than police officers-either inside or outside the parking lot-within eyesight of the brief search. To the extent any citizen observed the search without notice of the police, there is no evidence that such a person would have seen the private areas of Williams's body or any contact between the gloved hand of the officer and Williams's genitals, which remained obscured from the view of passers-by. Rather, the citizen would have observed from a distance that an officer briefly reached inside Williams's pants and pulled out a bag of cocaine. We conclude that such a search does not unreasonably infringe on Williams's privacy interests when balanced against the legitimate needs of the police to seize contraband-that he carried on his person.

Id. at 977-78.

Likewise, in *Smith*, 464 S.E.2d at 45, the defendant was stopped by police officers, and informed that he was suspected of transporting cocaine; the officer stood between the open car door and Smith and pulled back and down Smith's pants and underwear, reached

in, and pulled out a paper towel containing cocaine from under Smith's scrotum. Assessing the reasonableness of the search, the Supreme Court of North Carolina reversed the intermediate appellate court and adopted the dissent, *State v. Smith*, 454 S.E.2d 680, 687 (N.C. Ct. App. 1995) (Walker, J., dissenting), wherein Judge Walker concluded that the search was reasonable because there were sufficient exigent circumstances to conduct the search in the street to prevent the loss or destruction of the drugs and because the officer took precautions to protect Smith's privacy interests:

> The search in the instant case took place at approximately 1:30 A.M. at the intersection of two streets in Fayetteville. The record does not reveal the conditions at the time, and defendant's objection was that he did not want the officer to "search [his] rear" in "the middle of the street." Here the evidence does show that prior to the search Officer Cook asked defendant to step behind the open car door of his vehicle and that he positioned himself between defendant and the car door on the outside. Officer Cook said he took these steps "because [he] didn't want to expose [defendant] to other cars, the public, to embarrass him, that sort of thing." Defendant did not dispute this testimony. Considering the totality of the circumstances, I believe that the officers here, like the trooper in *Bazy*, took "the necessary and reasonable precautions to prevent the public exposure of defendant['s] . . . private areas." While there may have been other less

> intrusive means of conducting the search, I agree with the *Bazy* court that the availability of those less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation.
>
> Just as the court in *Bazy* was unwilling to second guess the procedures used by the officers in that case, I am unwilling to second-guess the trial court's finding here that the officers' conduct during the search did not violate defendant's Fourth Amendment rights. The trial court in ruling on defendant's motion to suppress had the arguments of both parties before it and was in a superior position to evaluate the reasonableness of the search. I do not believe defendant is entitled to a new trial, and I would affirm the trial court in all respects.

Id. at 687 (Walker, J., dissenting). Similar to the searches conducted in those cases, the search of Paulino was reasonable under the *Bell* reasonableness balancing test; the police needed to conduct the search in order to prevent either loss or destruction of the drugs, which could have occurred while in transit, and the officers protected Paulino's privacy interests by conducting the search in such a manner to prevent any onlookers from viewing his genitalia.

The majority contends, because the officer touched Paulino's clothes and body to view and secure the drugs, that the search constituted a strip search, citing *Amaechi v.*

West, 237 F. 3d 356 (4th Cir. 2001) (officer walked Amaechi to police car, causing her housedress to fall open, and during search, swiped his hand across Amaechi's vagina causing slight penetration of her genitals); *United States v. Dorlouis,* 107 F.3d 248 (4th Cir.), *cert. denied,* 521 U.S. 1126, 117 S.Ct. 2525, 138 L.Ed.2d 1025 (1997) (police took Paul inside a police van and ordered him to remove his clothes); *United States v. Vance*, 62 F.3d 1152 (9th Cir. 1995) (Vance consented to a pat-down search, which revealed a bulge in his crotch area and that he was wearing two sets of underwear; a customs officer then ordered Vance to remove his trousers and pull down his underwear); *Blackburn v. Snow*, 771 F.2d 556 (1 st Cir. 1985) (Blackburn was required by prison officials to remove her clothes so that a matron could view her armpits, lift her breasts, examine her genitalia, and spread her buttocks apart); *McGee v. State,* 105 S.W.3d 609 (Tex. Crim. App.), *cert. denied,* 540 U.S. 1004, 124 S.Ct. 536, 157 L.Ed.2d 410 (2003) (McGee was forced to remove his pants, bend down, and spread his buttocks); and *Hughes v. Commonwealth,* 524 S.E.2d 155 (Va. Ct. App. 2000) (Hughes' clothes were removed and he was asked to bend over and cough). These case are not instructive, however, because the searches in those cases involved removal of clothing, which was not present in this case, and because they involved an intentional touching of genitalia, which was far more intrusive than the touching the officer did in this case to secure the drugs.

Rather, the fact that Paulino was not fully or partially disrobed differentiates the instant search. In *McCloud v. Commonwealth,* 544 S.E.2d 866 (Va. Ct. App. 2001), the

defendant was arrested for possessing a stolen car; during the search incident to the arrest, the officer pulled McCloud's pants and underwear, away from his body and discovered plastic baggies containing cocaine. The officer reached inside McCloud's underwear and seized the baggies. In assessing the reasonableness of the search, the intermediate appellate court concluded that the search was not a strip search because the search did not involve full or partial disrobement, nor did it involve the exposure of McCloud's genitalia:

> We have found no cases, nor has appellant cited any, that include "arranging" of the suspect's clothing in a definition of "strip search."
>
> * * *
>
> Further, in a review of a number of federal appellate decisions, we found no cases that characterize a strip search as other than partial or total disrobement. *See Amaechi v. West,* 237 F.3d 356 (4th Cir. 2001); *Swain v. Spinney,* 117 F.3d 1 (1st Cir. 1997); *Justice v. City of Peachtree City,* 961 F.2d 188 (11th Cir. 1992); *Masters v. Crouch,* 872 F.2d 1248 (6th Cir. 1989); *Weber v. Dell,* 804 F.2d 796 (2nd Cir. 1986); *Salinas v. Breier,* 695 F.2d 1073 (7th Cir. 1982).
> In this case, in accepting the Commonwealth's evidence, we find appellant was not subjected to a strip search. Unlike in *Hughes, Moss, Taylor,* and *Gilmore,* appellant's clothing was not removed, and his genital area was not exposed.

> The officers made no visual inspection of appellant's genitals nor did the officers touch appellant's genitals. Therefore, we affirm the judgment of the trial court.

Id. at 868-69.

Further, in *Williams*, 477 F.3d at 974, a case remarkably close to the situation we consider here, the court rejected the argument that a search was unreasonably intrusive because it involved physical contact, remarking that such contact is unavoidable when conducting a search for drugs:

> Williams makes two objections to the search. First, he claims it was unreasonably intrusive in its scope and manner because it involved physical contact with his genitals. We disagree. The police could not have removed the drugs that Williams stashed near his genitals without making some "intimate contact," and we reject Williams's claim that such contact is *per se* unreasonable. Some physical contact is permissible, and indeed unavoidable, when police reach into a suspect's pants to remove drugs the suspect has chosen to hide there ....
>
> The search of Williams was both less intrusive, as it involved no penetration or public exposure of genitals, and far more justified, as police had probable cause to believe he was carrying drugs inside his pants.
>
> We disagree with Williams's claim that the police

> were required to avoid physical contact with him by directing him to disrobe and then visually inspecting his body for drugs. "A creative judge, engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." But the existence of "less intrusive means" does not, by itself, make a search unreasonable. While the potential for destruction of evidence is diminished when a suspect is in custody, it is not completely eliminated, and it was not unreasonable for the officers to assume the initiative by seizing the contraband that Williams secreted in his underwear, rather than allow Williams to disrobe and remove the drugs himself.
>
> * * *
>
> In contrast, a reach-in search of a clothed suspect does not display a suspect's genitals to onlookers, and it may be permissible if police take steps commensurate with the circumstances to diminish the potential invasion of the suspect's privacy.

Id. at 976-78 (some citations omitted). Thus, the fact that the search of Paulino involved an officer touching Paulino's buttocks to view the drugs did not automatically make the search an unreasonably intrusive strip search. Instead, Paulino's search was a reasonable "reach-in" search incident to arrest.

B.

Even were the search of Paulino to be considered a strip search, it was reasonable. Although the majority agrees that strip searches may be reasonable, it finds that the search of Paulino was unreasonable because it was conducted at a "public" car wash in the presence of Paulino's friends who arrived with him in the Jeep Cherokee. In its conclusion, the majority is establishing a *per se* rule that strip searches must be done in an enclosed area. Such a *per se* rule violates the standard of reasonableness iterated in *Bell v. Wolfish*, 441 U.S. at 520, 99 S.Ct. at 1861, 60 L.Ed.2d at 447. In *Bell,* the Supreme Court remarked that whether a strip search is reasonable is incapable of being measured by *per se* rules because the test for reasonableness "is not capable of precise definition or mechanical application." *Id.* at 559, 99 S.Ct. at 1884, 60 L.Ed.2d at 481. The Court did not differentiate between searches conducted in public and searches conducted in enclosed areas, stating that the reasonableness of a search is measured by balancing the need for the particular search – in this case, the police's need to prevent evidence from becoming destroyed or lost – against the invasion of privacy the search entails. *Id.*

In *Nieves,* 383 Md. at 573, 861 A.2d at 62, this Court considered whether a strip search was reasonable after Nieves had been stopped for a traffic offense. In assessing the reasonableness of the strip search, we noted that if an individual is connected with drug trafficking, a reasonable strip search incident to a lawful arrest may be conducted. *Id.* at 598, 861 A.2d at 77. Moreover, we did not

distinguish searches conducted in public from searches conducted in enclosed areas, instead emphasizing that "[i]n determining the reasonableness of a search, each case requires a balancing of the government's need to conduct the search against the invasion of the individual's privacy rights." *Id.* at 583, 861 A.2d at 68.

Therefore, whether a search is conducted in public as opposed to in an enclosed area is not controlling; the reasonableness of a search is measured by balancing the need for the search against the intrusion upon the individual's privacy rights. In *State v. Jenkins,* 842 A. 2d 1148 (Conn. App. Ct. 2004), an undercover police officer, after having been informed that the defendant was dealing drugs, arranged to buy heroine from him. When Jenkins approached the officer to sell him the drugs, he was arrested and taken to the side of a restaurant building to be searched; the officer subsequently pulled Jenkins's pants and underwear away from his body and discovered glassine packets of heroin and crack cocaine. Although the court considered the search of Jenkins a strip search, it found the search reasonable under the Fourth Amendment because the officers had reasonable suspicion that Jenkins had drugs on his person, and they adequately protected his privacy interests even though the search was conducted in public:

> A custodial arrest gives rise to the authority to search, even if the arresting officer does not "indicate any subjective fear of the [defendant] or . . . suspect that [the defendant] was armed." *"The justification or reason for the authority to search*

incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial . . . . It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a reasonable search under that amendment." (Citations omitted; emphasis added; internal quotation marks omitted). *It was, therefore, of no moment that Brody was searching for weapons or contraband.*

* * *

In this case, the manner in which the officers conducted the strip search struck the appropriate balance between "the need for the particular search" and "the invasion of personal rights . . . ." The officers took the defendant to the side of the restaurant, away from the street and out of public view. [The officer] did not require him to remove any of his clothing, but rather pulled his pants and underwear away from his body specifically to retrieve the glassine packets he discovered and suspected were there from the patdown of the defendant.

Id. at 1157-58 (emphasis added).

Similar to the search conducted in *Jenkins,* the police took reasonable precautions to protect Paulino's privacy interests, and the search, although not done in a physically enclosed space, was no more intrusive than necessary to determine whether Paulino possessed drugs. The evidence at the suppression hearing reflected that Paulino arrived at the car wash late at night when the car wash was closed to the public. The police arrested him, placed him on the ground and conducted the search, lifting up his boxer shorts, reaching between his butt cheeks and securing the baggie, precisely where they were told it would be. The police secured the drugs in Paulino's possession inside the bay of a car wash facility in the rear of a parking lot, blocked in by police vehicles, and secluded behind a storage facility and an automobile repair shop, such that the area could not be seen by passers-by. Although the majority assumes that Paulino's friends were present at the car wash and that they had the ability to view Paulino's buttocks during the search, there was no evidence adduced at the suppression hearing to support this assertion. Although one of the detectives testified that the car wash area was well-lit, there is no evidence that anyone saw Paulino's genitalia, nor that anyone other than the searching officer saw Paulino's buttocks.

Moreover, even when there exists alternatives, or less intrusive means, to conduct a search, that does not by itself render the search unreasonable. *See Byndloss v. State*, 391 Md. 462, 484, 893 A.2d 1119, 1133 (2006) ("A creative judge engaged in a *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been

accomplished. But '[t]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, itself, render the search unreasonable.' The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."), quoting *Wilkes v. State*, 364 Md. 554, 577, 774 A.2d 420, 433 (2001), quoting in turn *United States v. Sharpe*, 470 U.S. 675, 687,105 S.Ct.1568,1576, 84 L.Ed.2d 605, 616 (1985) (citations omitted).

By holding as it does, the majority impermissibly restricts the police's ability to conduct reasonable searches under the Fourth Amendment for drugs that are secreted on an individual known to be carrying such drugs to prevent their loss. I disagree, and would affirm the judgment of the Court of Special Appeals.

Judges Cathell and Wilner authorize me to state that they join in this dissent.

IN THE COURT OF APPEALS OF MARYLAND

No. 75

September Term, 2006

JOHN AUGUST PAULINO

v.

STATE OF MARYLAND

Bell, C.J.
Raker
Cathell
Harrell
Battaglia
Greene
Wilner, Alan M. (Retired, Specially Assigned),

JJ.

Dissenting Opinion by Cathell, J.

Filed: June 4, 2007

I join Judge Battaglia's dissent and would further hold that when a person wears their pants below the level of their buttocks, he or she is intentionally offering that area for observation by the public and obviously has no expectation of privacy sufficient to prohibit a police officer from also looking. If a person wants to have an expectation of privacy in that area of his or her body, he or she should keep their pants up when in public.

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0223

September Term, 2004

JOHN AUGUST PAULINO

v.

STATE OF MARYLAND

Eyler, Deborah S.
Meredith,
Thieme, Raymond G., Jr. (Retired,
Specially Assigned)

JJ.

Opinion by Meredith, J.

Filed: July 12, 2006

A man suspected of carrying illegal drugs in the crack between his buttocks was arrested at a car wash and searched at the scene of the arrest. Because the police conducted the search of the defendant's buttocks in a public area, the defendant asserts that the evidence seized as a consequence of that fruitful search should have been suppressed. The location of the search is only one of several factors we must balance in determining the legality of such a search, however, and, because the other factors weigh in favor of the State, we shall affirm.

Facts

On September 29, 2000, Detective Elliott Latchaw of the Baltimore County Police Department received word from a reliable confidential informant that John Paulino, the appellant, would be at a car wash in the 1100 block of North Point Road later that day with a quantity of crack cocaine on his person. According to the informant, the drugs would be secreted between Paulino's "butt cheeks." Detective Latchaw and other officers proceeded to the 1100 block of North Point Road, a commercial area that included a car wash. At approximately 11:14 p.m., the police saw a car with Paulino in the passenger seat pull into one of the car wash bays. The police "blocked the car in" and removed Paulino from the vehicle. They placed him on the ground and proceeded to look for the drugs.

Paulino was wearing his pants "real low," according to Latchaw, so it was not necessary to further remove his pants before the police "lifted up his shorts." Seeing no

drugs, one officer donned rubber gloves and "spread [Paulino's] cheeks apart a little bit and it was there," ("it" being a bag later found to contain cocaine).

The area was well lit, but aside from the other passengers in the car and various police personnel, there was nobody else present. Nonetheless, Paulino testified there were as many as twelve police officers present and three people in Paulino's vehicle. Paulino filed a motion to suppress, which was denied. He was subsequently convicted. On September 12, 2003, he sought post-conviction relief, and was granted the right to file a belated appeal.

Question Presented

Paulino raises a single question on appeal:

Is it unreasonable under the Fourth Amendment to conduct a body cavity search of a person in a public area within view of individuals who are not participating in the search?

Standard of Review

In reviewing a lower court's ruling on a motion to suppress, this Court is limited to considering the evidence introduced at the suppression hearing, and the inferences therefrom that are most favorable to the party who prevailed on the motion. *In Re Tariq A-R-Y*, 347 Md. 484, 488 (1997), *cert. denied*, 522 U.S. 1140 (1998). But the ultimate decision on whether the evidence was seized in

violation of the law is made independently of the lower court's decision. *Laney v. State*, 379 Md. 522, 534 (2004) ("We make our own constitutional appraisal as to whether an action taken was proper, by reviewing the law and applying it to the facts of the case.").

Analysis

In this case we agree with the motion court's conclusion that the search in question was not a body cavity search, but rather, was a limited strip search that was both justified and conducted in a reasonable manner. We will therefore affirm the ruling of the circuit court.

We take our guidance on this issue from the Court of Appeals, which has said:

> The term "strip search" has been defined and used in differing contexts in Fourth Amendment jurisprudence. In general, strip searches involve the removal of the arrestee's clothing for inspection of the under clothes and/or body. *See* William J. Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. Miami L.Rev. 665, 667 (2000). Some have defined strip searches to also include a visual inspection of the genital and anal regions of the body. *Id.* Black's Law Dictionary (7th Ed. 2004) defines a strip search as "a search of a person conducted after that person's clothes have been removed, the purpose usually being to find any contraband the person might be hiding."
>
> . . .

> There is a distinction between a strip search and other types of searches, such as body cavity searches, which could involve visually inspecting the body cavities or physically probing the body cavities. *Simonitsch, supra*, at n.9.

State v. Nieves, 383 Md. 573, 586 (2004)

Applying the *Nieves* definition to this case, the search that Paulino underwent would be considered a strip search, not a body cavity search. There was neither inspection nor manipulation of any actual body cavities. The bag discovered was outside the relevant cavity, clenched between two adjacent but not interior body parts.

In its brief, the State asserts that Paulino "was never asked to assume any humiliating or compromising positions." The average citizen would probably disagree with the State's contention that lying face down on the pavement while a police officer pries one's "butt cheeks" apart is not a humiliating position. Nonetheless, humiliation is common to all strip searches. On its own, however, humiliation is not enough to invalidate the search, but it is the reason why judicial scrutiny of such searches is more thorough than for other kinds of searches.

Evans v. State, 151 Md. App. 365 (2003), is instructive in this regard. Evans was stopped by police in Baltimore and drugs were found on him. He claimed that the drugs were found after a "body cavity or rectal search." The police countered that "the drugs were either in Evans's shorts or between his 'butt cheeks.'" *Id.* at 375. Although

we eventually found that Evans's version of the events was the more credible, we noted that, "If we were to believe the State's interpretation of the facts, our review should be governed by *Bell v. Wolfish*, 441 U.S. 520 (1979)." In this case, both Paulino and the State agree that the drugs were found between his "butt cheeks," so our review will be governed by *Bell*.

In *Bell*, the Supreme Court, reviewing a challenge to strip searches of pre-trial detainees in prison, said: "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 556. The justification in *Bell* was the need to keep drugs out of a correctional facility; the search was more private than, but more intrusive than, the one in Paulino's case.

Both the scope of the intrusion, and the justification for making it, support the State's case here. The police did not have to remove Paulino's pants, which were already sagging, and only had to "lift up" his shorts briefly. The search ended as soon as the baggie was found, and the entire search was as brief as possible. The justification was to find the drugs which a reliable informant had accurately described and which were the whole point of the arrest. This search was not a fishing expedition, but rather was limited to the specific location described by the

informant.

A person lawfully arrested may be subjected to a complete search of their person. *U.S. v. Robinson*, 414 U.S. 218, 235 (1973). In *Nieves*, *supra*, 383 Md. at 598, the Court of Appeals held that a "reasonable, articulable suspicion standard applies in the strip search incident to arrest context." Because of the nature of the informant's tip in this case, there was reasonable and articulable suspicion that Paulino had contraband in a place that would only be revealed by a limited strip search. But our inquiry does end there.

The other *Bell* criteria are the manner and place of the search. In *Nieves*, the Court of Appeals noted the humiliating nature of strip searches, stating: "It is clear that strip searches by their very nature can be degrading and invasive." *Id.* at 586-87.

In *U.S. v. Ford*, 232 F.Supp.2d 625 (E.D. Va. 2002), a court applying the *Bell* standards was faced with a situation in which a police officer conducted a search that was incident to a legal arrest. After having stopped a car on the George Washington Parkway, the officer made the driver stand at the rear of the vehicle, and after some preliminary fumbling, lowered the suspect's pants and underwear past his buttocks, in broad daylight on the side of a busy thoroughfare. The court noted that, even if the search was justified, "the body cavity search could have waited until Mr. Ford was taken to an appropriate location for such searches." *Id.* at 630. Accordingly, the court suppressed all evidence from the search.

In Ford's case, the highly public nature of the suspect's disrobing, which would have been visible to many drivers along the roadway, was key to the court's decision, as was the fact that the police had the option of performing the search later in a more appropriate location. Here, the police also had the option of taking Paulino to the station for a more appropriate search, but although the search occurred in a nominally public setting, there is no evidence that any members of the public were present, aside from the other people in Paulino's car, and the evidence further indicated that the car wash was "real secluded," such that the search of Paulino would not have been visible to passers-by.

Appellant cites *McGee v. Texas*, 105 S.W.3d 609, 617 (Tex. Crim. App. 2003), for an example of how a strip search can be performed constitutionally, noting that in that case the prisoner was moved to a secluded area of a fire station to ensure his privacy before the search was conducted. There, the overriding issue was privacy.

The Fourth Circuit has also commented that privacy is an important consideration in such searches, stating: "[w]e think that, as a matter of law, no police officer in this day and time could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search is a constitutionally valid governmental 'invasion of (the) personal rights that (such a) search entails.'" *Logan v. Shealy*, 660 F.2d 1007, 1014 (4th Cir. 1981), *cert. denied*, *Clements v. Logan*, 455 U.S. 942 (1982). In *Logan*, a civil rights action was filed against

the police after a strip search had been conducted in an enclosed room which was visible to a larger holding area through a partially-covered window, although there was no evidence anyone in the latter area actually observed the search.

At the suppression hearing in this case, Paulino testified that there were "about twelve" officers present, as well as the three people who were with him in the car. He did not testify as to how many of those people observed, or were in a position to observe, the search. The only other person to testify, Officer Latchaw, did not specify how many police were present, noting only that "other units of Baltimore County Police" were present. The physical location, a car wash, was described as being well lit but in a secluded area on a commercial side street in the Dundalk area. The arrest and search occurred a little after 11:00 p.m. Officer Latchaw testified that the area was not viewable by persons walking by, that it was "real secluded." The car wash was described as having "six or eight" bays, one of which the car pulled into, but no other patrons at the time of the arrest.

At the suppression hearing, Paulino testified, and the following exchange occurred:

Q. Where was this search conducted?

A. Inside a car wash.

Q. In the presence of other people or by yourself?

A. Other people was around. It was about 12 other officers.

Q. The three civilian people -

A. Three civilians that was with me.

Although it would be possible to speculate that a large number of police officers observed the search, along with the occupants of the car, we are limited to the facts adduced at the suppression hearing and the inferences most favorable to the prevailing party. Unlike in *Logan*, there was no testimony here that others were in a position to see the search, only that others were present in the same general vicinity. Location is only one of the four factors required to be balanced by *Bell*, and the other three all weight in favor of the State in this case.

There was no evidence presented to the suppression court that the search was not proper as to its scope, that it was not fully justified by the information known to police and by the right to conduct a search incident to arrest, or that it was conducted in an unprofessional manner. Absent a showing that the suspect's privacy was violated more than was necessary by the search, we cannot say that even this questionable choice of location outweighs the other *Bell* factors. We therefore shall uphold the ruling of the circuit court that denied Paulino's motion to suppress.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX C

THE COURT: In order for the police to rely on the probable cause that is established by a confidential informant, there must be two prongs present. This goes back. Aguilar and Spinelli cases talk about what is necessary when we're talking about probable cause supplied by a confidential reliable informant. There must be a basis of knowledge, and there must be reliability. Those are the two factors that one looks at.

Now, certainly, the law of search and seizure has developed since then so that those aren't the only things we look at in a search. We look at whether in considering the totality of the circumstances the search was a reasonable one, but in this case, we really do go back to those old -- seems to me, that old principle when the probable cause is supplied strictly by the confidential informant, we look at, is the confidential informant reliable? And the evidence that has been presented to me seems to indicate that this informant has been reliable in the past, his information has never been inaccurate. It's always been accurate. It's led to the arrest and seizure of drugs on the two occasions when he said that someone would have drugs and how they had them. So I believe, based on the evidence that's been presented, that he certainly is reliable, as that term is defined in the cases.

Then we go to the basis of knowledge. Well, I mean, the basis of knowledge, how did he know that Mr. Paulino would have drugs? Did he hear it from some third person? Did somebody say, Well, this guy always has it, and

therefore, he's probably going to have it, or was it some suspicion, or was it some unreliable basis of knowledge of the fact that Mr. Paulino would have drugs?

In this case, it probably is the -- the best basis of knowledge, the basis of knowledge is Paulino told him -- Paulino spoke to him and said to him, I'm going to have these drugs, and he talked to him that day. So it sure seems to me that it's not speculation or conjecture or a guess or a hunch or -- certainly there is a basis of knowledge, so we have reliability and a basis of knowledge to rely on what the confidential informant says to the police.

Now, I'm not convinced that this was a body and cavity search, quite frankly, not on the evidence I've heard presented to me, because somebody that has a bag of drugs concealed in their pants and happens to have it between their cheeks of their buttocks doesn't mean that it's in their body cavity. And quite frankly, it seems to me, from the evidence I've heard, I'm not convinced that that's so, so I'm not really concerned about the cases that talk about body-cavity searches, going into someone's body cavities to determine or find the drugs.

It seems to me that the police have probable cause to conduct the search they did and recover the cocaine they did. So the motion to suppress the evidence is denied.

All right. Is that the only motion we need to litigate?

MR. HENNINGER: Yes, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Thank you very much.

All right. The Court will recess.

(This matter concluded at 2:29 p.m.)

③

NO. 07-284

82

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,

Petitioner

v.

JOHN AUGUST PAULINO,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY S. FORSTER
Public Defender

HOWARD MARK COLVIN*
ALLISON E. PIERCE
Assistant Public Defenders

Office of the Public Defender
Appellate Division
6 Saint Paul Street, Suite 1302
Baltimore, Maryland 21202-
(410) 767-8519

*Counsel of Record

Counsel for respondent

QUESTION PRESENTED

Was the search of the respondent, which involved an officer putting on plastic gloves and spreading the cheeks of the respondent's buttocks to reveal drugs which were not visible before that time, unreasonable under the Fourth Amendment, when the search was conducted in the parking lot of a car wash in the presence of individuals other than the searching officer?

INDEX

TABLE OF CONTENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. THERE IS NO CONFLICT IN THE LOWER COURTS REGARDING THE REASONABLENESS OF STRIP SEARCHES, OR OTHER SEARCHES UNDERNEATH CLOTHING, INCIDENT TO ARREST. 5

II. THE MARYLAND COURT OF APPEALS PROPERLY WEIGHED THE FACTORS ENUNCIATED BY THIS COURT IN *BELL V. WOLFISH* AND CORRECTLY CONCLUDED THAT THE SEARCH OF THE RESPONDENT, WHICH IT CHARACTERIZED AS A VISUAL BODY CAVITY SEARCH, WAS UNREASONABLE UNDER THE FOURTH AMENDMENT, WHEN THE SEARCH WAS CONDUCTED IN A PUBLIC PLACE IN THE VIEW OF OTHERS. 15

CONCLUSION 20

TABLE OF CITATIONS

Page

Cases

Amaechi v. West, 237 F.3d 356 (4th Cir. 2001) 7

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) 6, 17

Commonwealth v. DiCicco, 2 Mass. L. Rptr. 174, 1994 WL 879762 (Mass. Super. 1994) 7

Commonwealth v. Thomas, 708 N.E.2d 669 (Mass. 1999) 7

Frye v. State, 757 N.E.2d 684 (Ind. Ct. App.), *transfer denied*, 761 N.E.2d 425 (Ind. 2001), *cert. denied*, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002) 11

McGee v. State, 105 S.W.3d 609 (Tex. Crim. App.), *cert. denied*, 540 U.S. 1004, 124 S.Ct. 536, 157 L.Ed.2d 410 (2003), *rehearing denied*, 540 U.S. 1143, 124 S.Ct. 1133, 157 L.Ed.2d 957 (2004) 8, 18

People v. Butler, 813 N.Y.S.2d 366 (N.Y. App.), *leave to appeal dismissed by* 817 N.Y.S.2d 628 (N.Y. 2006) 13

People v. Mitchell, 768 N.Y.S.2d 204 (N.Y. App. Div. 2003) 7, 11

State v. Jenkins, 842 A.2d 1148 (Conn. App. Ct. 2004) 7

State v. Nieves, 861 A.2d 62 (Md. 2004) 8

Thompson v. State, 824 N.E.2d 1265 (Ind. Ct. App. 2005) 7, 10

United States v. Cofield, 391 F.3d 334 (1st Cir. 2004) 7

United States v. Ford, 232 F. Supp. 2d 625 (E.D. Va. 2002) 7

United States v. Williams, 477 F.3d 974 (8th Cir. 2007), *cert. denied*, No. 07-5250, --- S.Ct. ---, 2007 WL 2005174 (U.S. Oct. 1, 2007) 6

United States v. Williams, 209 F.3d 940 (7th Cir. 2000) 7

NO. 07-284

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,

Petitioner

v.

JOHN AUGUST PAULINO,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, John August Paulino, by counsel, Howard Mark Colvin and Allison E. Pierce, Assistant Public Defenders, Office of the Public Defender for the State of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the State of Maryland as there has been no showing that the issue presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

After Mr. Paulino was charged with possession with intent to distribute cocaine and possession of cocaine, he filed a motion to suppress evidence that was recovered during a search incident to his arrest. The Circuit Court for Baltimore County held a hearing on that motion. At that hearing, Detective Elliott Latchaw,

a member of the Baltimore County Police Department, testified as the State's only witness.

On September 29, 2000, a confidential informant told Detective Latchaw that Mr. Paulino would be in the 1100 block of North Point Road with a quantity of crack cocaine on his person. (App.2a)[1]. The informant also told the detective that Mr. Paulino usually hid his drugs in the area of his buttocks. (App.2a).

In response to that information, Detective Latchaw, along with other officers, went to the car wash located in the 1100 block of North Point Road and established surveillance. (App.2a). While there, Detective Latchaw saw a car pull into one of the bays of the car wash. (App.2a-3a). Mr. Paulino was in the passenger seat of that car. (App.3a). Officers then "blocked" the car in, and "a team" removed Mr. Paulino from the vehicle. (App.3a).

Detective Latchaw described what happened next:

> Well, when we - - when Mr. Paulino was removed from the vehicle and laid on the ground, his pants were already pretty much down around his - - below his butt, because I guess that's the fad, these guys like wearing their pants down real low, so it was just a matter of lifting up his shorts, and - - and between his butt cheeks, the drugs were - - I believe one of the detectives actually put on a pair of gloves and just spread his cheeks apart a little bit and it was right there.

(App.5a). The detective was then asked, "So they were not visible before you actually spread his cheeks apart, is that correct?" (App.5a). He responded, "I don't think they were." (App.5a).

---

[1] References to "App." are to the appendix that is attached to the Petition for Writ of Certiorari.

The search of Mr. Paulino occurred at night. (App.3a-4a). Detective Latchaw testified that the area was "not at all" busy at that time. (App.3a). He stated that the car wash was "real secluded" and that it was not visible to people walking by the location. (App.4a). According to the detective, however, the area was "well lit." (App.4a). Detective Latchaw confirmed that other officers were present, but he did not recall anyone washing a car. (App.4a).

Mr. Paulino also testified at the suppression hearing, and he offered the following description of the search:

> They had searched me in my pockets, didn't find nothing, and eventually, they came to the subject where - - where in my report, it states the officer said, Mr. Paulino, why is your butt cheeks squeezed? And in further response, I said nothing. He said it again, and another officer came behind with gloves and pulled my pants down and went in my ass. Well, my cheeks. Sorry about that.

(App.6a). According to Mr. Paulino, approximately twelve officers, as well as three of his friends, were present when he was searched. (App.6a).

After the trial court denied Mr. Paulino's motion to suppress and after he was convicted by that court of possession with intent to distribute cocaine, Mr. Paulino appealed to the Maryland Court of Special Appeals. (App.6a, 49a-61a). That Court affirmed his convictions, and Mr. Paulino filed a petition for writ of certiorari, which the Maryland Court of Appeals granted. (App.6a-7a, 49a-58a).

Thereafter, the Court of Appeals held that the search of Mr. Paulino violated the Fourth Amendment, and it reversed the judgment of the intermediate appellate court. (App.9a-26a). The Maryland Court began its analysis by

characterizing the search as a "visual body cavity search." (App.16a). In doing so, it recognized that the police "did not only lift up Paulino's shorts, but also manipulated his buttocks to allow for a better view of his anal cavity." (App.16a). The Court then applied this Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) to the facts before it. (App.17a-26a). After recognizing that *Bell* "requires a flexible approach," (App.18a), the Court reviewed the scope of the search, the place and manner of the search, and the justification for initiating it. (App.19a-26a). It ultimately concluded that "the search of Paulino unreasonably infringed on his personal privacy interests when balanced against the legitimate needs of the police to seize the contraband that Paulino carried on his person." (App.26a).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE LOWER COURTS REGARDING THE REASONABLENESS OF STRIP SEARCHES, OR OTHER SEARCHES UNDERNEATH CLOTHING, INCIDENT TO ARREST.

At the outset of its petition, the State implies that the instant case provides this Court with the opportunity to reach an issue which it has not previously considered. Specifically, the State notes that "[t]his Court has not yet addressed . . . whether the authority to conduct a full search incident to an arrest includes the authority to search intimate areas underneath a suspect's clothing, whether by a strip search or a reach-in search." (Petition for Writ of Certiorari at 11). At no point in the proceedings below did Mr. Paulino argue that the authority to conduct a full search incident to an arrest does not include the authority to conduct a strip search or a visual body cavity search. Instead, Mr. Paulino's sole challenge was to the constitutionality of conducting a highly intrusive, physically invasive search in the parking lot of a car wash in the presence of individuals other than the searching officer. Accordingly, this case is not the proper vehicle for this Court to determine "the propriety of conducting a strip search incident to an arrest." (Petition for Writ of Certiorari at 11).

Next, the State argues that because this Court has not addressed the circumstances under which "a strip search or other search of intimate areas underneath a suspect's clothing is reasonable incident to arrest," there is a conflict among lower courts "regarding how to analyze the reasonableness of searches

conducted incident to arrest of a suspect believed to be concealing drugs on his or her person." (Petition for Writ of Certiorari at 9, 10). Although this Court has not addressed strip searches in the specific context of searches incident to arrest, it has provided a framework for the analysis of the constitutionality of strip searches and visual body cavity searches. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The lower courts, moreover, have almost uniformly applied that framework to cases involving strip searches and other invasive searches conducted pursuant to arrests.

In *Bell*, this Court reviewed a prison policy that required all inmates to submit to strip searches and visual body cavity searches after contact visits. *Id.* at 558, 99 S.Ct. at 1884. In addressing the constitutionality of that policy, the Court reiterated that the Fourth Amendment requires that searches be conducted in a reasonable manner. *Id.* The Court then explained,

> The test of reasonableness is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559, 99 S.Ct. at 1884.

The factors enunciated in *Bell* are as applicable to strip searches conducted incident to arrest as they are to strip searches conducted pursuant to prison policies, and the lower courts have consistently recognized that conclusion. *See United States v. Williams*, 477 F.3d 974, 975-77 (8th Cir.) (applying *Bell* factors in

analyzing a "reach-in" search incident to arrest that was conducted in a parking lot), *cert. denied*, No. 07-5250, --- S.Ct. ---, 2007 WL 2005174 (U.S. Oct. 1, 2007); *United States v. Cofield*, 391 F.3d 334, 336-38 (1st Cir. 2004) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted in a hallway of a police station); *United States v. Williams*, 209 F.3d 940, 943-44 (7th Cir. 2000) (applying *Bell* factors in analyzing a "reach-in" search incident to arrest that was conducted on the side of a road); *Amaechi v. West*, 237 F.3d 356, 361-62 (4th Cir. 2001) (applying *Bell* factors in the context of civil rights action against an officer who conducted a strip search incident to arrest in public); *United States v. Ford*, 232 F. Supp. 2d 625, 630-31 (E.D. Va. 2002) (applying *Bell* factors in analyzing a body cavity search incident to arrest that was conducted on the side of a busy highway); *State v. Jenkins*, 842 A.2d 1148, 1157-58 (Conn. App. Ct. 2004) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted on a public street); *Thompson v. State*, 824 N.E.2d 1265, 1267, 1269-71 (Ind. Ct. App. 2005) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted in a motel room); *Commonwealth v. Thomas*, 708 N.E.2d 669, 672-74 (Mass. 1999) (applying *Bell* factors in analyzing a visual body cavity search incident to arrest that was conducted in the corridor of a cellblock); *Commonwealth v. DiCicco*, 2 Mass. L. Rptr. 174, 1994 WL 879762, *2-*4 (Mass. Super. 1994) (applying *Bell* factors in analyzing a strip search incident to arrest that was conducted on a sidewalk); *People v. Mitchell*, 768 N.Y.S.2d 204, 206-07 (N.Y. App. Div. 2003) (applying *Bell* factors in analyzing a strip search incident to

arrest that was conducted on a public street); *McGee v. State*, 105 S.W.3d 609, 616-17 (Tex. Crim. App.) (applying *Bell* factors in analyzing a visual body cavity search incident to arrest that was conducted in a secluded area of a fire station), *cert. denied*, 540 U.S. 1004, 124 S.Ct. 536, 157 L.Ed.2d 410 (2003), *rehearing denied*, 540 U.S. 1143, 124 S.Ct. 1133, 157 L.Ed.2d 957 (2004). In fact, the State is forced to admit in its petition that "most courts assessing the reasonableness of a search beneath a suspect's clothing, whether by strip search or reach-in search, rely on the factors set forth by this Court in *Bell v. Wolfish*." (Petition for Writ of Certiorari at 12).

The State also asserts that "[t]here is a substantial conflict among lower courts . . . regarding what constitutes a strip search." (Petition for Writ of Certiorari at 15). This is problematic, according to the State, because "the characterization of a search as a strip search or a reach-in search is important in the assessment of the reasonableness of an on-scene search incident to arrest." (Petition for Writ of Certiorari at 15). Different courts have adopted slightly different definitions of the term "strip search." *See State v. Nieves*, 861 A.2d 62, 70 (Md. 2004) (recognizing that some courts define strip searches as "the removal of the arrestee's clothing for inspection of the under clothes and/or body" while other courts define strip searches to "include a visual inspection of the genital and anal regions of the body"). The lack of complete uniformity, however, is not a significant problem for the simple reason that the label that a court chooses to attach to a particular search does not determine the constitutionality of that search.

Instead, it is the circumstances and details of the actual search that determine its constitutionality. If an officer pulled down an arrestee's pants and visually inspected the arrestee's anal cavity and genitals in a public place before a crowd of people without justification for doing so, the search would likely be held unconstitutional regardless of whether the reviewing court labeled it a strip search, a visual body cavity search, or something else entirely. Similarly, if an officer merely reached into the waistband of the arrestee's pants in a public place to retrieve a weapon that he believed posed a danger and did so without exposing any part of the arrestee's body and after taking steps to ensure that the arrestee was shielded from view, the search would likely be held to be constitutionally reasonable regardless of whether the reviewing court labeled it a strip search, a reach-in search, or something else entirely.

Finally, the State asserts that a conflict exists in the lower courts concerning the weight to be given to the last of the *Bell* factors, the place in which the search was conducted. (Petition for Writ of Certiorari at 17). In the State's view, "[s]everal lower courts, like the Maryland Court of Appeals, have concluded that the test essentially proscribes a search underneath clothing that could possibly be viewed by others, which virtually precludes any such searches at the scene of the arrest." (Petition for Writ of Certiorari at 17). In support of its assertion, the State cites *Thompson v. State*, *supra*, and *People v. Mitchell*, *supra*. (Petition for Writ of Certiorari at 17-18). A review of those cases demonstrates, however, that the State has mischaracterized the impact and reach of their respective holdings.

In *Thompson*, the defendant was arrested in a motel room for "attempting to deal cocaine." *Thompson*, 824 N.E.2d at 1266. After his arrest, officers took the defendant into the bathroom where they conducted a strip search, which involved an officer pulling the defendant's pants down and ordering him to bend over. *Id.* While the defendant's "bare buttocks" were "exposed and raised in the air," *id.* at 1271, a civilian camerawoman filmed what was happening. *Id.* at 1269. During the ensuing search, officers "discovered a package of cocaine in between [the defendant's] buttocks." *Id.* at 1266.

On appeal, the defendant challenged the constitutionality of that search. The Indiana Court of Appeals began its analysis by stating that "[t]he lawfulness of a strip search depends on whether the circumstances reasonably justify such an intrusive invasion of privacy" and by noting the applicability of the *Bell* factors. *Id.* at 1267. The Court then recognized that some of the facts before it, including the fact that the defendant was arrested for a drug felony and the fact that officers had reason to believe that he had drugs on his person, "support[ed] a conclusion that the strip search of Thompson was reasonable." *Id.* at 1268. Ultimately, however, the Court condemned the search, stating,

> Where, as here, the search occurs in a private place and the police are in complete control of the circumstances surrounding the search, we can find no justification for law enforcement to allow a civilian to film or photograph the strip search of a suspect naked below the waist. We conclude that, under these circumstances, the strip search was not only unprofessional but was unreasonable under the Fourth Amendment.

Id. at 1271.

Nothing in the Indiana Court's opinion suggests that it intended to preclude all strip searches at the scene of an arrest as the State posits in its petition. (Petition for Writ of Certiorari at 17). Instead, it is apparent that the Court's holding was driven by the shocking and unique circumstances of the case before it. The fact that the Court rejected a search in which the police ordered a defendant to hold his buttocks in the air after he stripped from the waist down while a civilian camerawoman documented the event is hardly evidence that the Court would reject a less intrusive search that was not filmed. In fact, in an earlier opinion, the same Court upheld a strip search that was conducted in a bedroom of the house where the defendant was arrested. *See Frye v. State*, 757 N.E.2d 684, 687, 689-90 (Ind. Ct. App.), *transfer denied*, 761 N.E.2d 425 (Ind. 2001), *cert. denied*, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002).

Likewise, a review of the New York Court's decision in *Mitchell* demonstrates that its holding is not as broad as the State fears. The defendant in that case was arrested on a city street in the afternoon because the police suspected he was selling drugs. *Mitchell*, 768 N.Y.S.2d at 205. While the arresting officers were waiting for another officer to arrive, they observed the defendant "fidgeting with his hands, which were handcuffed behind his back, moving them towards his buttocks, back, belt and rear pants pockets." *Id.* After a pat down search failed to reveal any contraband, a supervisor ordered a strip search. *Id.* at 205-06.

Officers "took the defendant to the rear of the police van, which was parked on the street, in front of a church." *Id.* at 206. An officer then pulled down the defendant's pants as the defendant bent over with his head inside the van and his body outside the van. *Id.* The officer proceeded to put on plastic gloves and "searched [the defendant's] buttocks area," from which he recovered two "glassines of heroin." *Id.*

On appeal, the New York Appellate Court applied the *Bell* factors and concluded that the search was unreasonable. It explained,

> [W]e have no difficulty in holding that a strip search, conducted in a public place, regardless of whether it includes a search of the arrested person's body cavities, is not justified or reasonable absent the most compelling circumstances that pose potentially serious risks to the arresting officer or others in the vicinity. (accord. Illinois v. Lafayette, 462 U.S. 640, 645, 103 S.Ct. 2605, 77 L.Ed.2d 65 [1983]["the interests supporting a search incident to an arrest would hardly justify disrobing an arrestee on the street"]).
>
> The strip search in this case, conducted as it was on the street, in full view of the public, fails to meet the place or manner component of the *Bell v. Wolfish* inquiry, and, therefore, the glassine envelopes containing cocaine, obtained as a result of this unlawful search, should have been suppressed.

Id. at 206-207. Clearly, the *Mitchell* Court did not proscribe all "search[es] underneath clothing that could possibly be viewed by others." (Petition for Writ of Certiorari at 17). Rather, it proscribed the performance of full-blown strip searches on streets in daylight "in full view of the public" in the absence of a "compelling" reason to justify such actions.

People v. Butler, 813 N.Y.S.2d 366 (N.Y. App.), *leave to appeal dismissed by* 817 N.Y.S.2d 628 (N.Y. 2006), a subsequent decision by the same court, supports the conclusion that *Mitchell* is a narrow holding, limited to a very specific set of facts. In *Butler*, as in *Mitchell*, the defendant was arrested on the street for violations of the State's drug laws. *Butler*, 813 N.Y.S.2d at 367. When the arresting officer performed a pat down search, he felt "'a large rocky substance' in the defendant's upper buttocks." *Id.* Then, the officer "loosened and lowered" the defendant's pants and underwear "for a brief time and to a minimal degree in order to retrieve the glassine bag of cocaine . . .." *Id.* at 369. That bag either "sat atop [the] defendant's buttocks" or was "partly wedged in between," and the officer was able to retrieve it without putting on gloves. *Id.*

The trial court suppressed the drugs that were recovered, ruling that the strip search was impermissible. *Id.* at 368. The appellate court, however, reversed. *Id.* After that court rejected some of the trial court's factual findings, it simply held that a strip search had not occurred and that the case was "readily distinguishable" from *Mitchell*. *Id.*

The State also suggests that the Maryland Court of Appeals' opinion "essentially proscribes a search underneath clothing that could possibly be viewed by others . . .." (Petition for Writ of Certiorari at 17). Once again, a careful reading of the opinion demonstrates that the State is mistaken. Although the Maryland Court did take into account the fact that members of the public were present when Mr. Paulino was searched, (App.25a), it did not hold the search

unconstitutional simply because those persons may have seen the search. Indeed, the Court relied on a myriad of other factors in reaching its decision, including the fact that the search was "highly intrusive and demeaning" and involved the manipulation of Mr. Paulino's body, as well as the exposure of his buttocks; the fact that the search took place in well-lit car wash; the fact that the officers made no effort to shield Mr. Paulino from the view of the people present at the scene; and the fact that there was no evidence that Mr. Paulino possessed a weapon or was attempting to destroy evidence. (App.19a, 22a-25a). If any one of those facts had been different, the Court very well might have reached a different conclusion.

In summary, there is simply no conflict that needs to be resolved by this Court. When faced with determining the constitutionality of reach-in searches, strip searches and visual body cavity searches conducted incident to arrests in public settings, the lower courts have routinely applied the factors and test enunciated by this Court in *Bell v. Wolfish*. The courts have done so, moreover, in a remarkably consistent manner, condemning only the most egregious searches, thereby giving officers the leeway they need to protect themselves and to prevent the destruction of evidence.

II. THE MARYLAND COURT OF APPEALS PROPERLY WEIGHED THE FACTORS ENUNCIATED BY THIS COURT IN *BELL V. WOLFISH* AND CORRECTLY CONCLUDED THAT THE SEARCH OF THE RESPONDENT, WHICH IT CHARACTERIZED AS A VISUAL BODY CAVITY SEARCH, WAS UNREASONABLE UNDER THE FOURTH AMENDMENT, WHEN THE SEARCH WAS CONDUCTED IN A PUBLIC PLACE IN THE VIEW OF OTHERS.

The State argues that the Maryland Court of Appeals misapplied the balancing test enunciated in *Bell v. Wolfish*. (Petition for Writ of Certiorari at 20-25). In its view, the Court of Appeals "improperly assessed the scope and manner of the intrusion" and "placed too much weight on the fact that the search occurred in a public place." (Petition for Writ of Certiorari at 21). The State also contends that the Court erroneously stressed a lack of exigency. (Petition for Writ of Certiorari at 21).

As an initial matter, the State's argument rests on mischaracterizations of the evidence adduced at the suppression hearing. First, the State inaccurately describes the search of Mr. Paulino, claiming that "the officer simply reached in and retrieved the drugs" and stating that "Paulino's pants were kept in place during the search." (Petition for Writ of Certiorari at 20, 24). In reality, the search began with someone "lifting up [Mr. Paulino's] shorts" and continued with the searching officer "put[ting] on a pair of gloves" and actually "spread[ing] [Mr. Paulino's] cheeks apart a little bit." (App.5a). As the Maryland Court of Appeals explained, "It appears that the police officers attempted to manipulate Paulino's

clothing in such a manner that his buttocks could be more readily viewed. In this instance, the police did not only lift up Paulino's shorts, but also the officers manipulated his buttocks to allow for a better view of his anal cavity." (App.16a).

The State continues its mischaracterization by stating that the search took place "in a bay of a deserted car wash . . .." (Petition for Writ of Certiorari at 24). Although the detective testified that the car in which Mr. Paulino was a passenger pulled into one of the bays when it arrived at the car wash, (App.3a), the detective never testified that the search took place in that bay. Instead, he simply testified that Mr. Paulino "was removed" from the car and was "laid on the ground," where he was then searched. (App.5a). There is, therefore, no support in the record for the State's conclusion that the search itself occurred inside a bay of the car wash.

Finally, the State erroneously contends that "there is absolutely no evidence that anyone other than the searching officer saw Paulino's buttocks." (Petition for Writ of Certiorari at 23). Although neither Detective Latchaw nor Mr. Paulino specifically testified that anyone saw Mr. Paulino's buttocks, the officer confirmed that a "team" of officers participated in the arrest and confirmed that Mr. Paulino arrived at the car wash with other individuals. (App.3a). In light of those facts, the Court of Appeals soundly rejected the notion that "no one other than the searching officer saw Paulino's buttocks," stating,

> Detective Latchaw's testimony at the suppression hearing simply does not support this contention. To the contrary, it is entirely conceivable that the search of Paulino was visible to any of the persons present at the scene of the arrest. There is

> no dispute that three of Paulino's associates were present as well as a team of Baltimore County police officers. Moreover, Detective Latchaw did not testify that the searching officer took any precautions to shield Paulino's body, particularly the obviously exposed part of his buttocks, from public view.

(App.25a, n.7).

In addition to resting on factual inaccuracies, the State's argument is also wrong on its merits. The State first takes issue with the fact that the Court of Appeals took into account a lack of exigency when it considered Mr. Paulino's search. According to the State, exigency "is not a factor in the standard of reasonableness pronounced by this Court in *Bell*." (Petition for Writ of Certiorari at 21). It is true that this Court did not explicitly mention exigency as a factor in *Bell*. That failure, however, does not render the Court of Appeals' consideration of exigency error. Exigency, or the lack thereof, is certainly relevant to a determination of whether the police had justification for initiating the search, which is one of the enunciated *Bell* factors. *Bell*, 441 U.S. at 559, 99 S.Ct. at 1884.

In the instant case, the informant who provided Detective Latchaw with information told the detective where Mr. Paulino usually concealed his drugs. (App.2a). The police, therefore, were justified in conducting a reasonable strip search of Mr. Paulino at some point in time. There was absolutely no evidence adduced at the suppression hearing, however, that Mr. Paulino had a weapon. Nor was any evidence presented that Mr. Paulino was attempting to destroy the evidence that he possessed. As such, there was no exigency, or justification, for

conducting an immediate visual body cavity search in the parking lot of a car wash in the presence of members of the public, and the Court of Appeals was correct to take that into consideration in determining whether the search of Mr. Paulino was constitutional.

The State next quarrels with the fact that the Court of Appeals characterized Mr. Paulino's search as a strip search and visual body cavity search. (Petition for Writ of Certiorari at 21). As noted *supra*, Detective Latchaw testified that the search began with someone "lifting up [Mr. Paulino's] shorts" and continued with the searching officer "put[ting] on a pair of gloves" and actually "spread[ing] [Mr. Paulino's] cheeks apart a little bit" to reveal drugs that were not visible before that point in time. (App.5a). After taking into account the fact that the officers adjusted "Paulino's clothing in such a manner that his buttocks could be more readily viewed" and the fact that the officers "spread the cheeks of Paulino's buttocks to inspect his anal cavity," the Court concluded that the search "amounted to a visual body cavity search." (App.16a). In light of the circumstances of this case, the Court's characterization was a fair and accurate one.

In fact, the Maryland Court is not alone in characterizing the type of search that occurred in the instant case as a visual body cavity search. In *McGee v. State*, *supra*, officers forced the defendant to "drop his pants, bend over, and spread his buttocks." *McGee*, 105 S.W.3d at 613. When the defendant did so, the searching officer "saw several rocks of crack cocaine wrapped in red plastic in plain view

lodged between McGee's buttocks." *Id.* The officer explained that the drugs were not inside the defendant's anus and that he was able to retrieve the drugs "without digitally probing the anus." *Id.* Throughout the course of its opinion, the Texas Court referred to the search as a visual body cavity search. *Id.* at 616-18.

Moreover, the Maryland Court of Appeal's analysis of this prong of the *Bell* test demonstrates how fact-driven the analysis is. While analyzing the scope of the intrusion, the Court specifically noted that under a slightly different set of facts, it might reach a different conclusion, stating, "If, in the case *sub judice*, the drugs were protruding from between the cheeks of Paulino's buttocks and visible without spreading his buttocks cheeks, the classification of the type of search would be a close one." (App.16a). The Court's recognition that the change of one small fact could alter its conclusion simply demonstrates that the impact of this case on future litigants is not likely to be great, thereby making it a poor candidate for this Court's review.

Finally, the State suggests that the Court of Appeals "established a *per se* rule that on-scene strip searches incident to an arrest must be conducted in an enclosed area . . .." (Petition for Writ of Certiorari at 21). The Court, however, did no such thing. In analyzing the last of the *Bell* factors, the place in which the search was conducted, the Maryland Court found that this prong weighed against the constitutionality of the search for numerous reasons. First, the Court recognized that the police conducted an intrusive search in a "well-lit" public car wash. (App.22a-23a, 25a). Next, the Court recognized that members of the public

were present while the search was conducted. (App.24a, 25a). Finally, the Court noted that there was "no indication in the record . . . that the police made any attempt to limit the public's access to the car wash or took any similar precaution that would limit the ability of the public or any casual observer from viewing the search of Paulino . . .." (App.23a). Although the Court did suggest that the police could have searched Mr. Paulino in the confines of his car or a police vehicle, (App.25a-26a), the Court was simply noting that the police had multiple reasonable alternatives available to them, and it was in no way suggesting that the simple failure to use those alternatives was what rendered the search unconstitutional.

As the foregoing review of the Maryland Court of Appeals' opinion demonstrates, it is apparent that the Court recognized that its job was to assess the reasonableness of Mr. Paulino's search, by taking into account the *Bell* factors and by balancing the need for the search against the invasion of personal rights that it entailed. It is also apparent that the Court of Appeals actually undertook that balancing test and, in doing so, that it appropriately weighed each relevant factor. The State is simply aggrieved by the fact that, in the end, the scales did not tip in its favor. That is not a reason, however, for this Court to grant the State's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Mr. Paulino respectfully requests that this Court

deny the Petition for Writ of Certiorari.

Respectfully submitted,

Nancy S. Forster
Public Defender

Howard Mark Colvin*
Allison E. Pierce
Assistant Public Defenders

*Counsel of record

Counsel for respondent

Font: Times New Roman 13

68

(2)

No. 07-284

In The
Supreme Court of the United States

THE STATE OF MARYLAND,

Petitioner,

vs.

JOHN AUGUST PAULINO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF AMICI CURIAE STATES OF OKLAHOMA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, OREGON, SOUTH CAROLINA, AND SOUTH DAKOTA IN SUPPORT OF PETITIONER, STATE OF MARYLAND

W.A. DREW EDMONDSON
Attorney General of Oklahoma

PRESTON SAUL DRAPER*
JENNIFER B. MILLER
SETH S. BRANHAM
JENNIFER STRICKLAND
Assistant Attorneys General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921 FAX (405) 522-4534

Attorneys for Amici

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
State of Alabama

TERRY GODDARD
Attorney General
State of Arizona

DUSTIN MCDANIEL
Attorney General
State of Arkansas

JOHN W. SUTHERS
Attorney General
State of Colorado

JOSEPH R. BIDEN, III
Attorney General
State of Delaware

BILL MCCOLLUM
Attorney General
State of Florida

CHARLES C. FOTI, JR.
Attorney General
State of Louisiana

STEVEN ROWE
Attorney General
State of Maine

JIM HOOD
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

KELLY A. AYOTTE
Attorney General
State of New Hampshire

HARDY MYERS
Attorney General
State of Oregon

HENRY MCMASTER
Attorney General
State of South Carolina

LAWRENCE E. LONG
Attorney General
State of South Dakota

QUESTION PRESENTED

Where the police have reason to believe that a suspect is concealing cocaine between his buttocks cheeks, is it reasonable under the Fourth Amendment for the police, at the scene of the arrest, to reach into the suspect's undershorts and seize the cocaine as a search incident to the suspect's arrest?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF AMICI INTEREST	1
REASONS FOR GRANTING THE WRIT	3
I. Police must have the ability to conduct appropriate and reasonable searches incident to arrest at the scene of the arrest in order to prevent injury to themselves and preserve evidence	4
II. Police need "a single, familiar standard" without "subtle nuances and hairline distinctions" to guide their searches, especially in the context of narcotics arrests	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES CITED

Aguilar v. State, 594 A.2d 1167 (Md. App. 1991) 6

Brigham City, Utah, v. Stuart, ___ U.S. ___, 126 S.Ct. 1943 (2006) 11

Chimel v. California, 395 U.S. 752 (1969) 3

Com. v. Osborne, 816 N.E.2d 1249 (Mass. App. Ct. 2004) 4, 5

Moss v. Com., 516 S.E.2d 246 (Va. App. 1999) 5

New York v. Belton, 453 U.S. 454 (1981) 10

People v. Barnville, 819 N.Y.S.2d 234 (N.Y.A.D. 1 Dept. 2006) 4

Shepard v. State, 2006 WL 903728 (Tex. App.-Austin 2006) 6

State v. Gillis, 2007 WL 1953679 (Ohio App. 2 Dist. 2007) 5

State v. Mackey, 752 N.E.2d 350 (Ohio App. 2 Dist. 2001) 5

State v. Robinson, 2006 WL 697561 (Conn. Super. 2006) 4

Taylor v. Com., 2001 WL 604377 (Va. App. 2001) 8

U.S. v. Barnes, 443 F.Supp.2d 248 (D. R.I. 2006) 4

U.S. v. Bazy, 1994 WL 539300 (D. Kan. 1994) 7, 8

U.S. v. Murray, 22 F.3d 1185 1994 WL 119009 (D.C. Cir. 1994) 9

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Perdue, 427 F.Supp.2d 671 (W.D. Va. 2006) 4

Wright v. Bennett, 2003 WL 1964063 (S.D.N.Y. 2003) 6

OTHER CITES

G.M. Jones and B.A. Shorey, *Body-Packers: Grading of Risk as a Guide to Management and Intervention*, 84 ANN. R. COLL. SURG. ENGL. 131 (2002) 5

S.J. Traub, R.S. Hoffman, and L.S. Nelson, Body Packing—*The Internal Concealment of Illicit Drugs*, 349 NEW ENG. J. MED. 2519 (2003) 5

STATEMENT OF AMICI INTEREST

The State of Oklahoma and the other fourteen (14) amici states joining this brief urge the Court to grant certiorari in this case in order to ensure street-level police officers are not hindered in conducting reasonable searches incident to arrest in order to protect themselves and prevent the destruction or loss of evidence. Drug trafficking and distributing are pernicious and widespread crimes which impact practically every state and community in the country. States are particularly affected by the crimes of trafficking, possession, and distribution of controlled dangerous substances.

According to the Department of Justice's Bureau of Justice Statistics, state and local law enforcement officers, as opposed to federal officials, are responsible for the vast majority of drug offense arrests. *See* Bureau of Justice Statistics, Drug and Crime Facts (last revised Sept. 21, 2006) <http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm>. State and local police officers also often encounter drug traffickers and distributers who secrete relatively small but nonetheless significant amounts of drugs on or inside their bodies. One increasingly prevalent situation encountered by such officers is the concealment of drugs, especially crack cocaine, between the buttocks of street-level traffickers and distributers. This increasingly popular

mode of concealment poses threats to the preservation of evidence as well as to the safety of law enforcement officers.

The dual objectives of preserving evidence and protecting police officers are of vital interest to the states. For the states to be able to properly address these important interests, however, their police officers must have the ability to conduct appropriate searches incident to arrest at the scenes of the arrests without being hampered by arbitrary constraints such as those imposed by the Maryland Court of Appeals in the case below. Moreover, the controlling limits of the Fourth Amendment in such circumstances are unclear in light of splits among the various state and federal courts, as detailed by Maryland in its petition before this Court. These inconsistencies go not only to what actions are permissible by police officers in the line of duty but also to the determination of what constitutes a strip search or body cavity search. As such, the amici states respectfully urge this Court to grant review of the Maryland Court of Appeals' decision in order to define what constitutes a strip or body cavity search as well as to clarify the permissible limits of on-the-scene searches of arrestees.

REASONS FOR GRANTING THE WRIT

Although the Maryland Court of Appeals recognized searches incident to arrest are permissible to disarm arrestees and "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction[,]" Pet's App. at 11a (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)), it nonetheless imposed arbitrary conditions beyond a lawful arrest that must be met before any reach-in or partial strip search incident to arrest may be initiated. These conditions include evidence that an arrestee possesses a weapon or is actively "attempting to destroy evidence" and that no members of the public, "whether their view [is] obscured or otherwise," are present in the area where the search is going to occur. Pet's App. at 24a-26a. Police officers, however, must be allowed the flexibility to conduct appropriate searches incident to arrest at the scene of the arrest, even those that require viewing some unclothed portions of arrestees' bodies, in order to protect themselves and preserve evidence. Because the opinion issued by the Maryland Court of Appeals adds to the uncertainty regarding what types of searches may be conducted incident to arrest, when they may be initiated, and where they may be accomplished, the amici states urge this Court to grant review of the case below in order to clarify these important Fourth Amendment questions.

I. Police must have the ability to conduct appropriate and reasonable searches incident to arrest at the scene of the arrest in order to prevent injury to themselves and preserve evidence.

The phenomenon of drug traffickers and distributers concealing contraband and weapons between their buttocks or inserted into body cavities is prevalent and has been noted by police officers, courts, and medical professionals. *See, e.g., U.S. v. Barnes*, 443 F.Supp.2d 248, 250-51 (D. R.I. 2006) (case involving search of suspected drug distributer "who was reputed to secrete drugs between his buttocks"); *U.S. v. Perdue*, 427 F.Supp.2d 671, 674 (W.D. Va. 2006) (crediting testimony of officer who testified that out of 300 arrests for cocaine in which he was involved, approximately 100 involved circumstances where the suspect had secreted the drugs in his buttocks or groin area); *People v. Barnville*, 819 N.Y.S.2d 234, 236 (N.Y.A.D. 1 Dept. 2006) (noting officer's testimony that often drug suspects secrete drugs in or around their buttocks); *State v. Robinson*, 2006 WL 697561 *7 (Conn. Super. 2006) (unpublished) (testimony revealed that street-level narcotics distributers often hide drugs in between the cheeks of their buttocks); *Com. v. Osborne*, 816 N.E.2d 1249, 1253 (Mass. App. Ct. 2004) (reciting testimony from a Boston police officer that, based on his training and experience, he was aware "that persons store drugs, as well as weapons, secr[eted] in this area of their body [between buttocks cheeks], to avoid detection and/or

arrest"); *State v. Mackey*, 752 N.E.2d 350, 358 (Ohio App. 2 Dist. 2001) (Grady, J., concurring) (noting that the court "has reviewed numerous cases wherein crack cocaine was located in a search that probed the area between a suspect's buttocks"); *Moss v. Com.*, 516 S.E.2d 246, 249 (Va. App. 1999) (noting officer's testimony that "certain narcotics dealers hide contraband in areas they do not believe the police will search, such as the buttocks"); S.J. Traub, R.S. Hoffman, and L.S. Nelson, *Body Packing – The Internal Concealment of Illicit Drugs*, 349 NEW ENG. J. MED. 2519, 2519 (2003) (noting that body packing includes swallowing as well as inserting into the rectum or vagina packages of illicit drugs and is becoming increasingly popular); G.M. Jones and B.A. Shorey, *Body-Packers: Grading of Risk as a Guide to Management and Intervention*, 84 ANN. R. COLL. SURG. ENGL. 131, 131 (2002) (drug traffickers may conceal contraband in the body by swallowing it or inserting it into rectum or vagina).

As with the concealment and transportation of drugs between one's buttocks, authorities have observed that weapons, too, may be hidden in like manner. *See, e.g., State v. Gillis*, 2007 WL 1953679 *5 (Ohio App. 2 Dist. 2007) (unpublished) (noting that "[a]lthough weapons may not commonly be located in the buttocks area, some legitimate concern was established by the testimony [in the case, that it is possible to conceal a weapon in the buttocks]"); *Osborne*, 816 N.E.2d at 1253 (reciting officer's testimony that drugs as well as weapons can be hidden

between a suspect's buttocks); *Wright v. Bennett*, 2003 WL 1964063 *1 (S.D.N.Y. 2003) (unpublished) (case in which inmate was found to have a razor blade concealed in his buttocks); *Aguilar v. State*, 594 A.2d 1167, 1169-73 (Md. App. 1991) (noting testimony from officer that drug suspects often carry weapons in their pants and underwear and that such weapons may not be detected during a pat-down).

When police officers are unreasonably inhibited by court decisions from conducting reasonable searches incident to arrest, their abilities to protect themselves and preserve evidence are likewise diminished. Precluding officers from conducting appropriate reach-in or partial strip searches at the scenes of arrests simply encourages more drug traffickers and distributers to carry their wares and weapons secreted in their buttocks and surrounding areas because such law breakers anticipate that they will be able to avoid immediate searches of those areas and, thus, may have further opportunities to dispose of their contraband even after an arrest. These opportunities present themselves at the scene of the arrest, during transportation to a police facility, and even while at such facilities. For example, a suspect in a Texas case was arrested, handcuffed, and put into a police vehicle for transportation to a police station. *Shepard v. State*, 2006 WL 903728 *1-2 (Tex. App.–Austin 2006) (unpublished). While being transported, the suspect repeatedly turned in the seat and moved his hands, which were cuffed behind his back, despite being instructed to sit facing forward with his body

against the back of the seat. *Id.* The officer and suspect arrived at the station, where the suspect was removed from the vehicle and taken inside. *Id.* Sometime later, one of the officers involved in the arrest went back to the police vehicle and discovered a large sandwich bag containing several rock-like objects lying at the back portion of the seat where the suspect had been sitting. *Id.* The baggie had not been there before the suspect was placed in the vehicle. *Id.* The officer that transported the suspect testified that suspects often hide drugs between their buttocks or near their rectums and that the suspect in this case had sufficient freedom of movement, despite being handcuffed, that he would have been able to retrieve drugs from his underwear or buttocks and dispose of them in the police vehicle. *Id.*

As another example, a suspect who was arrested, handcuffed, and seated on the ground near a police vehicle while officers searched the car he had been driving, managed to pull what appeared to be a block of crack cocaine from his pants and stash it under the police vehicle. *U.S. v. Bazy*, 1994 WL 539300 *3 (D. Kan. 1994) (unpublished). Although the attempts to dispose of contraband were discovered in both of these cases, they nonetheless illustrate the real possibility that arrestees can and will dispose of evidence secreted in their buttocks areas even after having been arrested and restrained and that such attempts at disposal or destruction will not always be discovered. Moreover, these suspects' actions also show that an arrestee who had a weapon between his

buttocks could access and brandish the same despite being handcuffed and in police custody. Clearly, the concerns for officer safety and preservation of evidence in such cases are not merely theoretical.

In addition, several cases show that individuals who have contraband secreted in their buttocks often resort to trying to insert such contraband into their rectums or other body orifices in attempts to further dispose of or destroy the evidence after being arrested. For instance, a defendant in a Virginia case was observed conducting drug transactions, repeatedly reaching into the "crotch area" of his pants while dispensing cocaine to his customers. *Taylor v. Com.*, 2001 WL 604377 *1 (Va. App. 2001) (unpublished). After being arrested, police conducted a brief pat-down search of the defendant which yielded no contraband. *Id.* The defendant was then handcuffed, put into a police car, and transported to the police station. *Id.* While in the police car and later at the station, the defendant was seen to be moving around, sitting on his hands, and squirming in his chair. *Id.* Officers then conducted a strip search of the defendant followed by a body cavity search which showed the defendant had inserted what appeared to be a baggie of crack cocaine into his anus. *Id.* In a similar case from Kansas, a pair of defendants were detained on the side of the road while officers searched their vehicle. *Bazy*, 1994 WL 539300 at *3. Though handcuffed, both suspects repeatedly moved around and squirmed as they sat on the ground. *Id.* A subsequent strip search of the suspects showed that each had

drugs secreted in their underwear and that one had managed to partially insert the drugs into his rectum while the other had drugs concealed near his scrotum. *Id.* Another case, this time from Washington, D.C., also illustrates this phenomenon. *U.S. v. Murray*, 22 F.3d 1185 (table), 1994 WL 119009 (D.C. Cir. 1994) (unpublished). A suspect was arrested by police after they observed him dealing drugs and placing them inside the rear of his pants. *Id.* When police started to search him incident to his arrest in the area they saw him put the drugs, the suspect began resisting the police in such a way that police believed he was trying to push the drugs "deep into his buttocks area." *Id.* After subduing the suspect, police found a baggie of crack cocaine in between the cheeks of his buttocks. *Id.* As these cases illustrate, the concern about the destruction or loss of evidence in such circumstances is a real one.

Police officers must have the flexibility to conduct appropriate searches incident to arrest at the scene of arrest, even those that require some manipulation of an arrestee's clothing, in order to protect the states' interests in protecting the safety of law enforcement officers and preserving evidence from disposal or destruction. By inhibiting officers' abilities to conduct appropriate searches in furtherance of these worthy goals, the Maryland court's decision actually encourages more would-be law breakers to hide weapons or drugs in their buttocks or similar areas because they now have an expectancy that they will be protected from at least an immediate search of such areas, even

incident to a lawful arrest, and, therefore, will have further opportunities to dispose of or destroy their contraband sometime post-arrest. Because such a result is antithetical to a common sense application of the Fourth Amendment, the amici states urge this Court to grant certiorari review in this instance.

II. Police need "a single, familiar standard" without "subtle nuances and hairline distinctions" to guide their searches, especially in the context of narcotics arrests.

In 1981, this Court noted that Fourth Amendment doctrine should be expressed in readily applicable terms, not by rules with "subtle nuances and hairline distinctions." *New York v. Belton*, 453 U.S. 454, 458 (1981) (internal citation omitted). Therefore, this Court indicated that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). As fully discussed in Maryland's petition, the Fourth Amendment doctrine at issue in this case is confused and fractious and the decision in the case below only furthers the confusion. Instead of promoting "a single, familiar standard" by which street-level police officers can be guided, the Maryland Court of Appeals has added to the conflicts surrounding what constitutes a strip or body cavity search, what factors must be present to authorize a warrantless strip or body

cavity search, and whether such a search of an arrestee may ever be conducted at the scene of the arrest.

Thus, the case below is not unlike the case of *Brigham City, Utah, v. Stuart*, ___ U.S. ___, 126 S.Ct. 1943, 1947 (2006), which involved conflicts regarding "the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." As in that case, where the determination of what constituted exigent circumstances that would make a warrantless entry into a dwelling house reasonable varied drastically depending on which court one was in, the case below presents a similar situation of disparate standards for determining what is a strip or body cavity search and when and how such searches may be conducted. Because, in order to effectively perform their duties to protect society and enforce the law, police officers need clear and easily applicable standards by which to gauge their conduct during searches incident to arrest, the amici states respectfully urge this Court to grant certiorari review of the Maryland Court of Appeals' decision so as to provide clarification on these important Fourth Amendment issues.

CONCLUSION

For the reasons stated above, the amici states respectfully request this Court grant the petition for writ of certiorari.

Respectfully submitted,

W.A. DREW EDMONDSON
Attorney General of Oklahoma

PRESTON SAUL DRAPER*
JENNIFER B. MILLER
SETH S. BRANHAM
JENNIFER STRICKLAND
Assistant Attorneys General
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921 FAX (405) 522-4534

Attorneys for Amici

**Counsel of Record*